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IN THE

Supreme Court of the United States

October Term, 1955

No. [redacted]121

No.

No.

CHARLES P. CULLEN, as Treasurer of NEW YORK FIRE INSURANCE RATING ORGANIZATION, AGRICULTURAL INSURANCE COMPANY, ET AL.,

Appellants,

vs.

ALFRED J. BOHLINGER, as Superintendent of Insurance of the State of New York, INSURANCE COMPANY OF NORTH AMERICA AND PHILADELPHIA FIRE AND MARINE INSURANCE COMPANY,

Appellees.

Appeals From the Court of Appeals of the State of New York and the Appellate Division of the Supreme Court, First Department, of the State of New York

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION BELOW

There are three appeals included in this Jurisdictional Statement. Actually they are all the same case and will be treated as one. Only one record has been filed, in accordance with Rule 15 Subdivision 3 of the Revised Rules of this Court.

The first appeal is from the final order of the Appellate Division of the Supreme Court of the State of New York, First Department, which unanimously confirmed without opinion, a determination of appellee Superintendent of Insurance of the State of New York and from the order of the Court of Appeals of the State of New York, denying appellants' motion for leave to appeal to the Court of Appeals from said order of the Appellate Division. The second appeal is from the same two orders involved in the first appeal but contains in its record the final order of the Court of Appeals of the State of New York dismissing appellants' appeal as of right to the Court of Appeals on the ground that on the record no substantial constitutional question had been presented. The third appeal is from the said final order of the Appellate Division of the Supreme Court, First Department, which unanimously confirmed the determination of appellee Superintendent of Insurance and from the final order of the Court of Appeals, which dismissed appellants' appeal as of right to the Court of Appeals on the ground that on the record no substantial constitutional question had been presented.

The only written opinion discussing the merits of the case is by the appellee Superintendent of Insurance of the State of New York dated September 14, 1954. A copy of the opinion is attached as "Appendix A".

GROUNDS ON WHICH JURISDICTION IS INVOLVED

By their request for a hearing, and throughout the hearing itself, before the Superintendent of Insurance, appellants alleged a violation of their common law property rights and acts amounting to an unfair method of competition and an unfair trade practice under Article 9-D of the New York Insurance Law. The determination of the Superintendent of Insurance held that by reason of Section 184(4) of Article 8 of the New York Insurance Law, the appellee insurance companies were given the right to appropriate

and utilize the property of the appellants herein in their rating system, even though the statute makes no provision for the appellants to obtain compensation. In appellants' petition for review of this determination, pursuant to Article 78 of the New York Civil Practice Act, and in their briefs, the appellants drew in question the validity of Section 184(4) of Article 8 of the New York Insurance Law on the ground that the construction given to it by the Superintendent of Insurance was repugnant to the 14th Amendment to the United States Constitution. The Appellate Division of the Supreme Court, First Department, unanimously confirmed without opinion the determination of appellee Superintendent of Insurance on November 30, 1954 and dismissed the proceeding (284 App. Div. 963 Case No. 2). The order of the Appellate Division is attached as "Appendix C".

On January 13, 1955, the Court of Appeals of the State of New York denied appellants' motion for leave to appeal to the Court of Appeals. The order is attached in "Appendix D". The appellants again drew in question the validity of Article 8 of the New York Insurance Law by the affidavit of Charles P. Butler, in support of appellants' motion for leave to appeal, and in their printed brief in support of the said motion at pages 60-61. The appellants again raised this constitutional question in the notice of appeal as of right to the Court of Appeals dated January 27, 1955.

On April 12, 1955, the Court of Appeals dismissed appellants' appeal as of right to the Court of Appeals on the ground that on the record no substantial constitutional question had been presented (308 N. Y. 886). This order of the Court of Appeals is attached as "Appendix E".

The appellants filed their first notice of appeal to the Supreme Court of the United States in the Office of the Clerk of the County of New York in accordance with Rule 10 of the Revised Rules of this Court on April 8, 1955.

The second notice of appeal was filed on April 13, 1955. The third notice of appeal was filed on April 29, 1955. The Clerk has certified the record to this Court.

The jurisdiction of the Supreme Court of the United States to review judgment by direct appeal is conferred by Sec. 1257(2) of the Judicial Code of the United States (28 U. S. C. Section 1257(2)). Whether the United States Supreme Court reviews the order of the Appellate Division or the orders of the Court of Appeals, it has jurisdiction of the issue involved in these appeals since the validity of a state statute is constitutionally questioned and the decisions were in favor of the validity of the statute. The following decisions sustain the jurisdiction of this Court:

Matthews v. *Huwe*, 269 U. S. 262, 265 (1925);
Darling v. *City of Newport News*, 249 U. S. 540, 541-2 (1919);
Martin v. *City of Struthers*, 319 U. S. 141, 142 footnote 2 (1943);
Schuylkill Trust Co. v. *Commonwealth of Pa.*, 296 U. S. 113, 121-3 (1935);
International Steel & Iron Co. v. *National Surety Co.*, 297 U. S. 657 (1936);
State of Indiana v. *Brand*, 303 U. S. 95, 96-9 (1938);
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Tumey v. *Ohio*, 273 U. S. 510, 515 (1927);
Titus v. *Wallick*, 306 U. S. 282, 284 (1939);
Hetrick v. *Village of Lindsey*, 265 U. S. 384, 384-6 (1924);
Pennsylvania R. Co. v. *Public Service Commission of Pennsylvania*, 250 U. S. 566, 567-8 (1919);
Alton R. Co. v. *Illinois Commerce Commission*, 305 U. S. 548 (1939);
Van Huffel v. *Harkelrode*, 284 U. S. 225, 230 (1931).

The particular portion of Article 8 of the New York Insurance Law which is under attack by these appeals is Section 184(4). The provisions of Section 184(4) are set forth in "Appendix F".

QUESTION PRESENTED

This is a proceeding brought by the New York Fire Insurance Rating Organization and fifty members thereof against the Superintendent of Insurance of the State of New York and the Insurance Company of North America and the Philadelphia Fire and Marine Insurance Company, directly challenging the constitutional validity of Section 184(4) of Article 8 of the New York Insurance Law, which was interpreted by the appellee Superintendent of Insurance in his determination of September 14, 1954. The determination, as approved by the Courts of the State of New York, permits the appellee insurance companies to employ the expensive and complex rating system and materials prepared, promulgated, maintained and owned by appellant, the New York Fire Insurance Rating Organization, in competition with members and subscribers of the Rating Organization, without assuring the appellants payment of just compensation therefor. Hence the appellants are seeking from the United States Supreme Court a determination on the following question:

> Is Section 184(4) of Article 8 of the New York Insurance Law which, as interpreted by the New York Courts, permits competitors of members and subscribers of the New York Fire Insurance Rating Organization to expropriate and use, without payment and without consent, the rating system of the said Rating Organization and all the materials which are a part thereof, whether on file with the New York Insurance Department or not, violative of the due process clause of the 14th Amendment to the Constitution of the United States of America in that the statute does not provide means by which

compensation can be assured, adjudicated and accorded the New York Fire Insurance Rating Organization and/or its members and subscribers for the expropriation and use of the said property?

STATEMENT OF THE CASE

The New York Fire Insurance Rating Organization, hereinafter called NYFIRO, an unincorporated association of fire insurance companies, has functioned since prior to 1900 for the purpose of developing and promulgating fire insurance rates in the State of New York. NYFIRO is licensed, pursuant to statute, by the New York Insurance Department and its constitution and by-laws are filed with and approved by that Department. NYFIRO and fifty associated companies are the appellants herein.

Every stock fire insurance company doing business in New York was, at the time of the decision sought to be reviewed, either a member or subscriber of NYFIRO, the only difference between the two being the privilege of voting. The Insurance Company of North America and the Philadelphia Fire and Marine Insurance Company, hereafter known as the appellee companies, were members as early as 1899 and agreed, first as members and then as subscribers, to be bound by NYFIRO's constitution and by-laws. For more than half a century the appellee companies received and used the materials of NYFIRO in connection with their insurance activities.

NYFIRO conducts a periodic inspection study and grading of town and fire districts; inspects risks and properties; supplies rating schedules and other rating data and makes rates on risks; reviews policies to determine whether they comply with NYFIRO's filings; procures and distributes written material to members, subscribers and their agents; and correlates its state-wide operations to maintain essential uniformity of procedure.

All of this work is performed in connection with the development and maintenance of an integrated system of fire insurance rating. This requires constant attention to the daily flux and changes that must necessarily be considered and assimilated in rate making in order to meet the statutory standards and avoid unfair discrimination. There has resulted from this work a mass of material in NYFIRO's possession which constitutes the work product supporting its general plan of rating developed over the years. It would cost at least $20,000,000.00 to reproduce this material, and the annual cost of operating NYFIRO is $2,100,000.00.

Little of the material produced by NYFIRO is filed with the Insurance Department. Section 184 (1) of the Insurance Law requires the filing only of the general rating plans and general schedules pursuant to which the individual rates are determined (Section 184 (1) is attached as "Appendix G"). The great amount of data which forms the basis of filings and the basis of the manuals is never filed with the Insurance Department. This data includes city and town surveys, inspection reports, individual property surveys, and maps indicating the risks within given areas. Many forms and rate cards are loaned to members and subscribers but not submitted to or filed with the Department.

Section 181(5) of the Insurance Law limits the right of inspection of pertinent information as to a rate to a person upon whose property or risk the rate is applicable (Section 181(5) is attached as "Appendix H").

On December 7, 1953, the appellee companies made an alleged independent filing with the appellee Superintendent relating to certain dwelling classes and simultaneously notified NYFIRO that they terminated their subscribership with respect to those dwelling classes but not with respect to the remaining services of NYFIRO.

The appellee companies' filing consists of five volumes comprising approximately 400 pages, which for the most part are cut up and realigned photographic reproductions of rules, clauses, forms, schedules, rates, and other data prepared by NYFIRO.

The appellee insurance companies conceded that the information upon which their filing is based was obtained by them as subscribers "from material furnished to us by the rating organization" and that as of December 7, 1953 the appellee companies filing was identical with that which NYFIRO had made (see pages 234 and 228 of the printed "Record on Proceeding" before the Appellate Division).

The so-called independent filing made by the appellee companies does not include an independent promulgation of rates, but requires the use of NYFIRO's rates which reflect the daily changes in the rating plan not shown in the appellee filing.

Prior to the effective date of the alleged independent filing and partial termination of subscribership, NYFIRO, in writing, requested the respondent Superintendent to grant a hearing in connection with the alleged independent filing made by the appellee companies. The request for hearing alleged, among other things, that the action of the appellee companies constituted a wrongful appropriation of NYFIRO's property; that the appropriation and filing were in violation of law and the constitution and by-laws of NYFIRO, to which the appellee companies had subscribed and agreed to be bound; that the filing was not in fact an independent filing; and that said actions constituted unfair trade practices and unfair competition under Section 9-D of the Insurance Law.

The Superintendent's determination, while recognizing the value of the rating system prepared, operated and maintained by NYFIRO held that Section 184(4) of the

Insurance Law permitted competitors to appropriate and use the system and materials which are a part thereof. He so maintained, even though much of the material is not, nor ever has been, in the possession of the Insurance Department.

In order to review this determination, the appellants then instituted in the Supreme Court, New York County, a proceeding pursuant to Article 78 of the Civil Practice Act, by the service of an order to show cause made by Mr. Justice Felix C. Benvenga, at Special Term of the Supreme Court, New York County dated October 14, 1954, and the petition and affidavits annexed thereto, upon the appellees on October 14, 1954. Appellants challenged the validity of Section 184 (4) of Article 8 of the Insurance Law by Paragraph 25-l of their petition to review, and in the affidavits in support thereof.

On October 18, 1954, an order was made at Special Term of the Supreme Court, New York County, transfering the proceeding to the Appellate Division of the Supreme Court, First Department, pursuant to the provisions of Section 1296 of the Civil Practice Act. This order is attached as "Appendix B".

The Appellate Division of the Supreme Court, First Department, made a final order dated and entered in the Office of the Clerk of the Appellate Division, First Department, on November 30, 1954, unanimously confirming, without opinion, the determination of appellee Superintendent of Insurance and dismissing the proceeding (284 App. Div. 963 Case No. 2). Here the constitutional question was argued by appellants at pages 76-90 of their printed briefs.

Thereafter, the Court of Appeals denied appellants' motion for leave to appeal on January 13, 1955 and on April 12, 1955, dismissed appellants' appeal as of right (308 N. Y. 886). The constitutional issues were raised

before the Court of Appeals in the affidavit of Charles P. Butler in support of appellants' motion for leave to appeal in Paragraph 9, Subdivision 2; in appellants' printed brief in support of the motion for said leave to appeal, at pages 60-61; and in appellants' notice of appeal to the Court of Appeals of the State of New York dated January 27, 1955.

FEDERAL QUESTIONS INVOLVED ARE SUBSTANTIAL

The acts of the appellee insurance companies encompass an appropriation of a continuous, functionally integrated system of rating and inspection composed of a very large number of charts, forms, rules, schedules, inspection reports and other relevant data.

Relatively little of the material produced by NYFIRO is filed with the Insurance Department. Only that which is necessary to comply with the requirements of the Insurance Law is submitted, while the great amount of data which forms the basis of the filings and the basis of the manuals loaned to the members and subscribers are never deposited with the Insurance Department. These include such materials as detailed surveys of cities and towns; reports of inspection of buildings, water systems and fire lighting facilities, etc.; numerous individual property surveys, such as inspections made of specifically rated properties in congested areas, inspections made of fire resistive dwellings, inspections made to determine whether property has been converted from a business use to a dwelling use, and maps which indicate the risks within given areas. There are also many forms and much other data including rate cards which are delivered to the members and subscribers, but not submitted to or filed with the Insurance Department.

Upon withdrawal from membership or subscribership in NYFIRO, the members or subscribers are required to surrender the material thus furnished to them. By-Law

12 and By-Law 13 of the Constitution and By-Laws of NYFIRO read in part as follows:

"By-Law 12

"Property Rights

. . .

"Section 2. Rights and Liabilities Upon Withdrawal.

"In the event that any Member or Subscriber of the Rating Organization shall cease to be a Member or Subscriber thereof, all interest of such Member or Subscriber in the Rating Organization or any of its assets and property shall immediately cease and terminate . . ."

"By-Law 13

"Ownership of Publications, Etc.

"Surveys, rate books, tariffs and other publications, and cabinets, cards and matter supplied by the Rating Organization are and shall remain the property of the Rating Organization, and title thereto shall remain vested in the Rating Organization. It is a condition of membership and of subscribership that all such publications, cabinets and matter are only loaned to the Member or Subscriber during continuance of membership or of subscribership; and no payments made to the Rating Organization by way of dues, assessments, charges or otherwise, shall establish a proprietary interest therein. Upon termination of membership or of subscribership, whether by resignation or expulsion, the Member or Subscriber shall, if so requested, at once cause to be returned to the Rating Organization all surveys, rate books, tariffs, and other publications, and cabinets, cards and matter previously supplied."

Counsel for the appellee companies conceded that the information upon which their filing is based was obtained by them as subscribers "from material furnished to us by the rating organization" (See page 234 of the printed "Record on Proceeding" before the Appellate Division).

Counsel for the appellee companies also conceded that "as of December 7, 1953 the filing which the respondent [appellee] companies made was identical with that which the Bureau [NYFIRO] made" (See page 228). Agents of the appellee companies are continuing to use NYFIRO rate cards on their risks and the appellee companies advised their agents to use NYFIRO town classification data (See pages 410 and 429). Agents of the appellee companies are using the NYFIRO system and are submitting duplicates of policies (called "dailies") based on the NYFIRO system for the business of the appellee companies (See page 410).

The system valued at over $20,000,000.00 costs over $2,100,000.00 a year to operate and maintain. Without constant revision, the system and materials would lose their validity as a rating mechanism.

The dispute in this case is of national significance. It arises out of the 1948 amendments to the New York Insurance Law. These amendments originated in the National Association of Insurance Commissioners' model legislation which was prepared after the decision in the South-Eastern Underwriters case (*United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533 (1944)) and the ensuing passage of Public Law 15 (15 U. S. C. Sections 1011-1015). Public Law 15 exempted the insurance industry from the Federal anti-trust laws in those areas in which the industry is state-regulated.

There can be no doubt of this Court's jurisdiction of these appeals under Title 28 U. S. C. Section 1257(2). The appellants raised the Constitutional issue in their petition for review of the Superintendent's determination which was as soon as the issue became evident (See *International Steel & Iron Co.* v. *National Surety Co.,* 297 U. S. 657 (1936)). Appellants have contended at every stage of this case that the Superintendent's determination was based on an unconstitutional construction of the statute involved. Nevertheless the New York Courts have upheld this illegal construction (See *Schuylkill Trust Co.* v. *Commonwealth*

of Pennsylvania, 296 U. S. 113, 121-3 (1935); *International Steel & Iron Co.* v. *National Surety Co., supra; Winters* v. *People of State of New York,* 333 U. S. 507 (1948); *Darling* v. *City of Newport News,* 249 U. S. 540, 541-2 (1919); and *State of Indiana* v. *Brand,* 303 U. S. 95, 96-9 (1938)). This construction is inherent in all the decisions by the New York Courts, because without it, as the Superintendent of Insurance points out in his written determination, the appellee insurance companies would have no right to appropriate appellants' property. The Superintendent apologetically remarked, "It is not easy for anyone who respects property rights to conclude that they can be rightfully appropriated without the consent of the owner, especially by a competitor" (See "Appendix A", at page 50).

The New York Court of Appeals in dismissing appellants' appeal as of right, taken in pursuance of the constitutional issues only, on the ground that the record presented no substantial constitutional question, adjudicated the merits of the issues (*Matthews* v. *Huwe,* 269 U. S. 262, 265 (1925); *Van Huffel* v. *Harkelrode,* 284 U. S. 225, 230 (1931); *Martin* v. *City of Struthers,* 319 U. S. 141, 142 footnote 2 (1943); *Tumey* v. *Ohio,* 273 U. S. 510, 515 (1927); *Titus* v. *Wallick,* 306 U. S. 282, 284 (1939); and *Pennsylvania R. Co.* v. *Public Service Commission of Pennsylvania,* 250 U. S. 566, 567-8 (1919)).

Most of the forty-eight states have adopted statutes embodying provisions similar to the provisions involved in these appeals. What the appellee insurance companies have done in New York, was attempted in Canada by other companies but the Supreme Court of Canada defeated the attempt at such appropriation by competing companies (see *Underwriters Survey Bureau, Ltd.* v. *Massey & Renwick, infra,* and *Underwriters Survey Bureau, Ltd.* v. *American Home Fire Assurance Co., infra*).

The importance to the public welfare and to the insurance industry is manifest. Insurance, perhaps more than any other industry, requires procedural stability and sub-

stantive fairness for the public's, as well as the industry's, welfare. These qualities cannot be achieved without adhering to the basic requirements symbolized by and guaranteed by the due process clause of the 14th Amendment to the United States Constitution: the protection of elementary property rights.

To allow competitors to expropriate highly valuable rating materials without payment and to attach themselves parasitically to a highly complex and efficiently operating system of rate-making without being made responsible for its maintenance and cost is beyond any reasonable definition of fairness. But this is exactly what the statute permits—and without providing within its terms the necessary arrangements for notice and hearing and, especially, compensation.

The appellant Rating Organization possesses valued and valuable property rights in this system and in the components thereof. *Underwriters Survey Bureau, Ltd.* v. *Massie & Renwick, Limited* [1940] 1 D. L. R. 625, S. C. R. 218, affirming [1938] 2 D. L. R. 31, Ex. C. R. 103; and *Underwriters Survey Bureau Ltd.* v. *American Home Fire Assurance Co.* [1939] 4 D. L. R. 89. In the *Massie & Renwick* case, the Supreme Court of Canada, which is the highest court of appeal in the Dominion, said at page 632:

> "But I think, having regard to the considerations just mentioned, it is a legitimate inference that it was well understood by everybody that this rating material was produced for the exclusive use of the members of the Association and, consequently, that in the members of the Association vested the sole and exclusive right of multiplying copies . . ."

The Canadian court also held that the defendant insurance companies abandoned their possession of these rating materials upon ceasing to be Bureau members, just as the appellee companies did upon resigning from the Rating Organization (See By-Laws 12 and 13 of NYFIRO's Con-

situation and By-Laws signed by the appellee companies (Exhibits 6, 7, 9 and 10) at page 11 of this Statement).

This Court as well as the Courts of New York and other jurisdictions by established rule protect these property rights. *International News Service* v. *Associated Press*, 248 U. S. 215 (1918); *Shechter Poultry Corp.* v. *United States*, 295 U. S. 495, 531 (1935); *Metropolitan Opera Assn. Inc.* v. *Wagner*, 199 Misc. 786 (N. Y. Sup. Ct. 1950), affirmed 279 App. Div. 632 (N. Y. 1st Dept. 1951); *Terminal Music Supply* v. *Musical Instruments Exchange*, 283 App. Div. 869 (N. Y. 1st Dept. 1954), appeal denied 283 App. Div. 1030; *Meccano* v. *Wagner*, 234 Fed. 912 (S. D. Ohio 1916), modified on other grounds, 246 Fed. 603 (C. C. A. 6th 1917); *Prest-O-Lite Co.* v. *Davis*, 209 Fed. 917 (S. D. Ohio 1913), affirmed 215 Fed. 349 (C. C. A. 6th 1914); *Press-On, Inc.* v. *Goodman*, 293 N. Y. 36 (1944); *Fisher* v. *Star So.*, 231 N. Y. 414 (1921); *Madison Square Garden Corp.* v. *Universal Pictures Co.*, 255 App. Div. 459 (N. Y. 1st Dept. 1938); *Mutual Broadcasting System Inc.* v. *Musak Corp.*, 177 Misc. 489 (N. Y. Sup. Ct. 1941); *F. W. Dodge Co.* v. *Construction Information Co.*, 183 Mass. 62 (1903); *F. W. Dodge Corp.* v. *Comstock*, 140 Misc. 105 (N. Y. Sup. Ct. 1931); *Walley, Inc.* v. *Saks & Co.*, 266 App. Div. 193 (N. Y. 1st Dept. 1943); *Healey* v. *R. H. Macy & Co.*, 251 App. Div. 440 (N. Y. 1st Dept. 1937), affirmed 277 N. Y. 681 (1938); *Henry Glass & Co.* v. *Art-Mor Togs, Inc.*, 101 N. Y. S. (2d) 538 (N. Y. Sup. Ct. 1950 not officially reported); *Moore* v. *N. Y. Cotton Exchange*, 296 Fed. 61 (C. C. A. 2nd 1923), affirmed 270 U. S. 593, (1926); *Chamber of Commerce* v. *F. T. C.*, 13 Fed. (2d) 673, 688 (C. C. A. 8th 1926); *Ketcham* v. *N. Y. World's Fair*, 34 F. Supp. 657 (E. D. N. Y. 1940), affirmed without opinion, 119 Fed. (2d) 422 (C. C. A. 2d 1941); *Waring* v. *Dunlea*, 26 F. Supp. 338 (E. D. N. C. 1939); *Associated Press* v. *KVOS*, 80 Fed. (2d) 575 (C. C. A. 9th 1935), reversed on jurisdictional grounds, 299 U. S. 269; *Vortex Mfg. Co.* v. *Ply-Rite Contracting Co.*, 33 Fed. (2d) 302, 312-

313 (D. Md. 1929); *Meyer* v. *Hurwitz*, 5 Fed. (2d) 370 (E. D. Pa. 1925), appeal dismissed 10 Fed. (2d) 1019 (C. C. A. 3rd 1926); *Waring* v. *WDAS Station, Inc.*, 327 Pa. 433 (1937); *Caliga* v. *Inter-Ocean Newspaper Co.*, 215 U. S. 182 (1909); *Werckmeister* v. *American Lithographic Co.*, 134 Fed. 321 (C. C. A. 2nd 1904); *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284 (1907); *O'Neill* v. *General Film Co.*, 171 App. Div. 854 (N. Y. 1st Dept. 1916); *Board of Trade of Chicago* v. *Hayden-Krull Co.*, 109 Fed. 705 (U. S. C. C. E. D. Wis. 1901), affirmed without opinion, 124 Fed. 1017 (C. C. A. 7th 1903).

In *International News Service* v. *Associated Press, supra*, the United States Supreme Court affirmed the granting of an injunction to the Associated Press. International News Service was enjoined from, among other things, copying its news from bulletin boards of the earlier editions of Associated Press member newspapers and selling it bodily or in rewritten form to International News Service customers. The case is of particular significance because of the great public interest in the free dissemination of news. However, the court recognized that as between the parties, even news was quasi-property.

One factor, strikingly evident in the modern conception of unfair competition, as pointed out in the above cases, is the distinction which is made in the enforcement of property rights in favor of the owner as against the public on the one hand and in favor of the owner as against his competitor on the other hand. Whatever interest the public may have in the general distribution of news, advertising and sales materials, or musical performances, for example, no competitors of the creating agency may usurp the finished product for their own competitive advantage and use it as a weapon against the creator of the product. Nor may a commercial enterprise attach itself leech-like to an efficiently functioning business system, established and maintained by the skill, time, money and effort of a competitor, without being required to pay for its mis-

deeds (See *Metropolitan Opera Assn., Inc.* v. *Wagner, supra; Meccano* v. *Wagner, supra,* at pages 916-20; and *Prest-O-Lite Co.* v. *Davis, supra,* at page 923).

When a government becomes a party to such improper activity, the safeguards of the Constitution come into play. Under the 14th Amendment, governmental regulation is required to be reasonable so as not to amount to a confiscation of property without compensation. *Panhandle Eastern Pipe Line Co.* v. *State Highway Commission of Kansas,* 294 U. S. 613 (1935); *Mississippi Railroad Commission* v. *Mobile & O. R. Co.,* 244 U. S. 388 (1917); *Southern Ry. Co.* v. *Commonwealth of Virginia,* 290 U. S. 190 (1933); *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393 (1922); *Schlesinger* v. *State of Wisconsin,* 270 U. S. 230 (1926); *Chicago R. I. & P. Ry. Co.* v. *United States,* 284 U. S. 80, 96-97 (1931).

"While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co.* v. *Mahon, supra,* at page 415. As Mr. Justice Holmes warned in that case, at page 416:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Section 184(4) of Article 8 of the New York Insurance Law, as interpreted by the New York Courts, by permitting one insurance company to appropriate the property of its competitors without providing within its terms, or otherwise securing, a requirement for compensation or a means by which compensation can be adjudicated and accorded, is unconstitutional under the due process clause of the 14th Amendment to the United States Constitution. *Louisville & Nashville Railroad Co.* v. *Central Stock Yards Company,* 212 U. S. 132 (1909); *Chicago, B. & Q. R. Co.* v. *City of Chicago,* 166 U. S. 226 (1897); *Missouri Pacific*

APPENDIX A

Determination of Respondent Superintendent of Insurance, Dated September 14, 1954

DECISION

In the Matter of the

Independent Fire Filing of the
Insurance Co. of North America, et al.

for

Dwelling Classes 009, 019, 029, and 011

In its petition for this hearing the New York Fire Insurance Rating Organization (a duly licensed rating organization hereinafter referred to as "NYFIRO") (1) complains that the Insurance Company of North America and Philadelphia Fire and Marine Insurance Company (both duly licensed foreign insurers hereinafter called "North America Companies") violate its property rights and the New York Insurance Law by the filing with the Superintendent of Insurance and obtaining approval of rates for the so-called "dwelling classes" (Classes 009, 019, 029 and 011), and (2) requests the Superintendent to withdraw approval of such filing. During the course of the hearing fifty duly licensed insurers, all members of NYFIRO, intervened along with and in support of the petitioner. The North America

Companies appeared at the hearing; entered a general denial and moved to dismiss this proceeding on jurisdictional grounds.

The hearing was held in the New York City Office of the Insurance Department on February 25, 26 and March 5, 1954. NYFIRO called three witnesses: Sumner Stanley, General Manager of NYFIRO John R. Barry, who appeared as Chairman of a Subcommittee of NYFIRO and Mr. Joseph F. Collins, Chief of the Rating Bureau of the Insurance Department. NYFIRO also introduced a number of exhibits. During the hearing Mr. Russell Carson read a statement on behalf of the New York State Association of Insurance Agents in opposition to the actions of the North America Companies. The North America Companies did not call any witnesses but introduced several exhibits.

The principal facts are clear and are not in dispute:

On December 7, 1953 the North America Companies were subscribers to NYFIRO for all classes of risks rated by NYFIRO in respect to fire and allied lines of insurance. On that day the North America Companies notified NYFIRO that they terminated subscribership for rating services for the dwelling classes effective March 1, 1954. Such rating services included rates for fire, extended coverage, additional extended coverage, windstorm and hail, vandalism and malicious mischief and time element coverages. As used herein dwelling classes include: under Codes 009, 019, 029, dwellings, other than seasonal or farm dwellings, of not more than four families, specifically:

Appendix A

029—Dwellings: buildings only when written on separate policy.

009—Household contents of dwellings, when contents are written on separate policy.

019—Dwellings: buildings and contents when both are written on same policy.

Also included herein under "dwelling classes" is Code 011 which covers: seasonal dwellings, seasonal boarding and rooming houses, camps, auto courts, tourist cabins—buildings and contents.

The notice of December 7, 1953 further stated that the North America Companies desired to retain subscribership privileges for the remaining rating services of NYFIRO.

In respect to the dwelling classes, the North America Companies on December 7, 1953 independently filed with this Department class rates and schedules substantially identical with those filed by NYFIRO on behalf of its members and subscribers. The proposed effective date of the North America independent filing was March 1, 1954 thereby coinciding with the effective date specified in their letter to NYFIRO in which they terminated subscribership for the dwelling classes. The independent rate filing of December 7, 1953 was deemed to meet the requirements of the New York Rating Law by operation of that section of the law which provides that a filing not disapproved during a waiting period of 15 days or any extension thereof shall be deemed approved.[1]

[1] Insurance Law, Section 184 (4).

Appendix A

In its letter dated February 2, 1954 petitioning this hearing, NYFIRO alleged in respect to the independent North America dwelling class filing of December 7, 1953 that:

(1) In making such filing the North America Companies appropriated to their own use without consent of the Rating Organization, forms, rules and rates owned by the Rating Organization which had been merely loaned to the North America Companies.

(2) This appropriation was in violation of the law and the Constitution and By-Laws of NYFIRO.

(3) The attempt of North America Companies to become limited subscribers was in violation of law and the Constitution and By-Laws of NYFIRO.

(4) The filings were not in effect independent but were in violation of the Constitution and By-Laws of NYFIRO and an attempt to circumvent the deviation section of the Insurance law by placing the North America Companies in a position of later attempting to modify these filings downward without conforming to the requirements of the deviation section.

(5) The North America Companies' filing did not meet the standards of the rate approval set out under the Insurance Law.

(6) The filing of the North America Companies constituted an undefined, unfair trade practice in violation of Section 278 of the Insurance Law.

Appendix A

During the course of the hearing it became apparent that two issues had to be determined prior to any consideration of other points raised by the petition of NYFIRO. Accordingly I restricted the evidence adduced to that relevant to these questions:

(1) Does the New York Rating Law and the Constitution and By-Laws of NYFIRO give the North America Companies the right to subscribe partially to the services of NYFIRO?

(2) Were the North America Companies entitled to make and secure approval of the kind of filing made by them on December 7, 1953?

As to the remaining contentions of NYFIRO, including the question relating to whether or not the North America Companies' filing of December 7, 1953 meets the standards of reasonableness, adequacy, non-excessiveness and non-discrimination set out in the rating article, I ruled that in the event the Department answers the questions set forth in the preceding paragraph in the affirmative I would then regard the hearing as adjourned to a future date at which time there would be entertained any petition from any qualified person or organization which alleges that the North America Companies' filing does not comply with the provisions of the Insurance Law.

NYFIRO is an unincorported association of insurers and has been licensed by the Insurance Department of the State of New York to make rates for fire and allied lines. As of February

1, 1954, 178 insurers doing business in this state were members of NYFIRO and 81 were subscribers. The difference between a member and a subscriber is that a member has the right to vote. Stock fire insurers are eligible for membership and subscribership is open pursuant to the New York Insurance Law[2] and the Constitution and By-Laws of NYFIRO to all duly licensed insurers. Practically all stock insurers writing direct fire insurance in New York are either members of or subscribers to NYFIRO as are about 90% of all insurers writing direct fire and allied lines business in this State. Members and subscribers of NYFIRO write about 90% of the fire and allied line premium volume in this state.

In addition to NYFIRO and the National Automobile Underwriters Association which rates automobile fire insurance, there are three other fire rating organizations licensed in New York. They are the Underwriters Rating Board which provides rating services to the advance premium cooperative fire insurers licensed under Article XIB of the Insurance Law; Factory Mutual Rating Bureau which is the rate making agency of the Associated Factory Mutual Fire Insurance Companies, a group specializing in the insurance of sprinklered properties of high grade construction and the Mill and Elevator Rating Bureau which makes rates for mutual insurers writing grain risks. There are also some independents in the fire field which file their own rates: Affiliated FM Insurance Co. a stock corporation used by the Associated Factory Mutual group to write non-

[2] Insurance Law, Section 181 (4).

sprinklered risks; the Associated Reciprocal Exchanges; the Warner Reciprocals; Bakers Lloyds; New York Merchant Bakers Mutual; Workmen's Mutual Fire which insures household furniture of members of labor unions; Livingston County Mutual Fire Insurance Co. and West Seneca Mutual Fire Insurance Association which are advance premium cooperatives.

Two mutual insurers, subscribers to NYFIRO for all other classes rated by it, do not subscribe for lumber and woodworking risks for which classes they make their own filings based on their own system. Likewise the members of the Mill and Elevator Rating Bureau partially subscribe to NYFIRO in that they do not subscribe to NYFIRO for grain risks. Similarly several cooperative insurers subscribe to NYFIRO only for sprinkler leakage insurance.

Up to the time of the filing of the North America Companies on December 7, 1953, no stock company had attempted a partial subscribership and other than the Affiliated FM Insurance Co. no stock insurer had made an independent filing of fire rates.

Rates made by NYFIRO are either class rates or schedule rates. Class rates are usually applicable to all risks within a defined classification. Schedule rates are determined specifically for each individual risk after inspection and are the result of the application of certain charges and credits reflecting detailed physical characteristics of the risk in accordance with the applicable rating schedule. Approximately 350,000 rate cards are published by NYFIRO in respect to schedule rated risks. In this State the dwelling classes produce

about 34% of the fire premium volume and about 70% of the total fire policies issued fall into these classes. Generally dwellings are class rated although less than 1% of dwellings such as large area country estates and fire resistant dwellings are schedule rated. On the other hand about 15% of fire risks in New York are class rated in addition to dwellings and thus about one-half of the New York fire premium volume is class rated and about one-half schedule rated.

In its rate filings with this Department NYFIRO employs a system of grading cities, towns and fire districts. Under this system, cities and towns are graded A, B, C or D. This classification is sometimes referred to as the "town list". These gradings run through the whole fabric of fire rate making, including both class and schedule rating. The "town list" is the end result of a considerable expenditure of time and money and it results from a rather detailed and periodic inspection of the fire protective facilities of cities, towns and fire districts. In the 30 cities of this State having a population over 25,000 the inspections are made by personnel of the National Board of Fire Underwriters, a duly qualified advisory organization, on the basis of a copyrighted grading schedule prepared by it. In municipalities under 25,000 and occasionally in the cities over 25,000 the inspections are done by personnel of NYFIRO on the basis of the National Board Grading Schedule. These schedules and the inspection reports of the National Board are supplied to NYFIRO for no fee in accordance with the working arrangement between the parties and are intended for the use of the members and sub-

scribers of NYFIRO. The National Board also makes its reports available to the particular city reported upon.

In adopting the rate filing of NYFIRO in respect to the dwelling classes as its own filing the North America Companies in effect appropriated the "town list", since the "town list" is an integral part of the filing for such classes.

The North America Companies have informed their producers that if any risk in the dwelling classes is subject to schedule rating that a specific rating may be obtained from the insurers upon application.

On March 1, 1954, the North America Companies sent the following letter to their New York agents:

> "North America Companies' independent rate filings for the Dwelling Classes become effective for use in your State on March 1, 1954. This change in rate filing authority was announced to our agents in letter dated December 7, 1953. As stated in that letter, *North America Companies' direct filings are identical with those presently effective.*
>
> "Under separate cover you will receive a Fire Manual. An order blank is attached for the requisitioning of forms and endorsements from your Processing Office. The classes of business included in our independent filings are:
>
> 1. Household contents of dwellings, when contents are written on separate policy.
> 2. Dwellings—buildings and contents, when both are written on same policy.

3. Dwellings—buildings only, when written on separate policy.

4. Seasonal Dwellings, Seasonal Boarding and Rooming Houses, Camps, Auto Courts, Tourist Cabins—Buildings and Contents.

"The above classifications include the coverages of Fire, Extended Coverage, Additional Extended Coverage, Windstorm and Hail, Vandalism and Malicious Mischief, and Time Element.

"Your Service Office, upon request, will provide rates promptly for those classes of risks referred to in the Fire Manual for which specific rates must be promulgated.

"Please mail all daily reports, endorsements, binders and cancellations applicable to *all classes of fire business* direct to the following address:

Springfield Processing Office
North America Companies
195 State Street—P.O. Box 224
Springfield, Massachusetts

"The company will audit the business within the scope of our filings, following precisely present practices. When necessary, criticisms will be issued. The forwarding of all classes of fire business directly to the Processing Office will simplify mailing and accounting procedures, and we will send to the Bureau classes requiring their audit.

"We are confident that you will wish to join us in taking this inaugural step to meet the needs of our policyholders and agents."

NYFIRO contends that the March 1, 1954 letter was an instruction to the North America agents to use for all classes of fire business the rates, schedules and forms of NYFIRO. This, NYFIRO argues, would also include any changes made in rating cards on schedule rated risks. The North America Companies argue that the letter merely was intended to notify agents of the independent filing and to instruct them to apply to the companies to obtain rates for schedule rated risks within the dwelling classes.

As has been pointed out even schedule rating to some extent employs the town grading system. During 1953 NYFIRO made 91,395 inspections and 167,302 specific schedule rates were computed and published.

The approximate annual cost of operating NYFIRO is about $2,100,000. It was estimated at the hearing that it would cost at least $20,000,000 to reproduce the rating data gathered by the rating organization. Apart from expenses attributable to the preparation of the "town list" the bulk of the expense of NYFIRO is attributable to the rating of schedule rated risks.

The North America Companies have offered to pay to NYFIRO a reasonable sum for the use of the rating services of the NYFIRO for the dwelling classes. This offer has been refused by NYFIRO and the question of compensation is not involved in this hearing. NYFIRO has consented to the use of its "town list" and other rating data by other rating organizations.

Between December 7, 1953 and the date of the hearing NYFIRO had made certain shifts and changes in its filings with this Department. Some

rules have been changed and revisions of forms filed. Thirty-four classifications of cities and towns have been changed and there have been approximately 75 changes in fire protection district boundaries. Thus at the time of the hearing the independent filing of the North America differed from the filing in effect for members and subscribers of NYFIRO to the extent of the aforementioned changes or variations.

As stated above, at the hearing, I limited evidence to two issues:

1. Does the New York law and the rules and regulations of NYFIRO permit partial subscribership?
2. Were the North America Companies entitled to make and secure approval of the kind of filing made by them on December 7, 1953?

1. Prior to 1944 the majority of states in this country did not regulate fire or casualty insurance rates. New York, was in the minority in that it had a rate regulatory law since 1911, which law was substantially strengthened in 1922.

Following the South-Eastern Underwriters Association case in June 1944[3] and the enactment of Public Law 15 in 1945,[4] practically all the states adopted rate regulatory legislation patterned after the Commissioner's—All Industry bills. These bills, one for fire insurance and one for casualty

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[3] U. S. v. South-Eastern Underwriters Assn. et al., 322 U. S. 533.

[4] Public Law 15, 79th Congress as amended by Public Law 238, 80th Congress.

insurance provided, in the opinion of the National Association of Insurance Commissioners and the All-Industry Committee[5] adequate rate regulation within the purview of Public Law 15.

In 1948 Article VIII of the Insurance Law (Sections 180-189 inclusive) which contains the fire and casualty rate regulatory law of this State, was extensively amended. The reasons for the 1948 amendments are fully set out in the 1948 report of the Joint Legislative Committee on Insurance Rates and Regulation.[6] Suffice it to say here that the amendments were intended to bring the New York regulatory law into substantial conformity with the recommendations of the Commissioners—All Industry Committee.

Prior to 1948 Section 181(4) read:

> "Each rating organization shall furnish its rating service without discrimination to all of its members and subscribers, and shall, subject to reasonable rules and regulations, permit any authorized insurer, not admitted to membership, to become a subscriber thereof."

Since the 1948 amendment Section 181(4) reads:

> "Section 181 (4) Each rating organization shall furnish its rating service without dis-

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[5] The All-Industry Committee was organized in May 1945 at the suggestion of the Committee on Rates and Rating Organizations of the National Association of Insurance Commissioners. The All-Industry Committee represented all branches of the insurance business (life, fire, marine, accident and health, casualty and surety; stock, mutual, reciprocal and fraternal; bureau and independent brokers and agents) and was ultimately composed of designated representatives of 19 national organizations.

[6] Legislative Document 1948 #46.

crimination to all of its members and subscribers, and shall, subject to reasonable rules and regulations, permit any authorized insurer, not admitted to membership, to become a subscriber to its rating services for any kind of insurance or subdivision thereof written by casualty or surety insurers or for any kind of insurance or subdivision or class of risk or a part or combination thereof written by fire or marine insurers or for such other insurers for which it is authorized to act as a rating organization. Notice of proposed changes in such rules and regulations shall be given to subscribers. The reasonableness of any rule or regulation in its application to subscribers, or the refusal of any rating organization to admit an insurer as a subscriber, shall, at the request of any subscriber or any such insurer, be reviewed by the superintendent at a hearing held upon at least ten days' written notice to such rating organization and to such subscriber or insurer. The superintendent may, after such hearing, issue an appropriate order."

The rules and regulations of NYFIRO are set forth in its Constitution and By-Laws. The current constitution of NYFIRO was adopted in 1948 and in respect to partial subscribership reads in part:

"Article V

Subscribers—Limitation of Rights

"An insurer, not a Member of this Rating Organization, authorized to transact the busi-

ness of fire insurance, in the State of New York, may apply for and receive as a Subscriber the service furnished by the Rating Organization by complying with the provisions of Article IV hereof, but no such Subscriber shall be entitled to vote at meetings of the Rating Organization.

"The Rating Organization shall furnish its rating service without discrimination to all of its Members and Subscribers. A Subscriber may subscribe to its rating service for any kind of insurance or subdivision or class of risk or a part or combination thereof written by fire or marine insurers for which the Rating Organization is authorized to act as a rating organization.

Article X

"Section 2(b) When subscribers subscribe to rating services limited as to kind of insurance or subdivision or class of risk or a part or combination thereof written by fire insurers for which this Organization is authorized to act as a rating organization, the assessment shall be based upon the gross direct premiums, less only return premiums, for such kinds of insurance or subdivision or classes of risk."

During the hearing it was made abundantly clear that the language of the constitution of NYFIRO quoted above was adopted to meet the request of this Department that the rules and regulations of NYFIRO be brought into con-

formity with the 1948 amendments to the rating article including Section 181(4).

NYFIRO in arguing that neither Section 181(4) of the Insurance Law nor its constitution permits the North America Companies the right of partial subscribership urges that:

1. Prior to 1948 the rating law authorized a rating organization to require its members and subscribers to adhere to rating organization rates for all kinds of insurance rated by such rating organization.

2. The 1948 amendments were intended to be applicable only to situations described *supra* where certain mutual insurers writing specialty risks on their own rating plans such as grain and lumber risks, had been permitted to eliminate such classes from their NYFIRO subscriberships.

It is noted however that nowhere does NYFIRO document or otherwise prove that the 1948 amendments were so limited and it is therefore assumed that this is merely an unsupported opinion of legislative intent.

It has also been pointed out on behalf of NYFIRO that no stock insurer sought partial subscribership up to the action of the North America Companies reviewed herein.

Here too, it is observed that while this point is correct as a statement of fact, nowhere does NYFIRO connect this fact with whether or not Article VIII of the Insurance Law permits partial subscriberships. If NYFIRO argues that just because no one has taken such action, such action

is illegal, the argument must be rejected as a *non-sequitur.*

NYFIRO concedes that under Article VIII of the Insurance Law it is theoretically possible for an insurer to operate as an independent. However it argues such an insurer would have to be independent for all classes of fire insurance written by it, with the result that in the case of an insurer writing a general line of fire business, rating services including the maintenance of the town list and the servicing of schedule rated risks would be prohibitively expensive. In other words, NYFIRO believes that the North America Companies in order to avail themselves of the independent status guaranteed by our rating law must in effect either duplicate or substitute for and then maintain the entire rating system of NYFIRO. This, in the opinion of NYFIRO, would involve needless duplication and expense. NY FIRO's position is apparently based upon the assumption that the public interest is better served by rates which are made in concert rather than independently. In support of this proposition NYFIRO points to certain language appearing in reports of a 1911 and a 1922 Legislative Committee[7] and a 1925 case in the New York Court of Appeals.[8] The Language in the reports and the case cited in substance, says that as a matter of experience and expense, it is impractical for one insurer to maintain a rating organization.

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[7] Merritt Legislative Report, Assembly Document 1911, page 40 Lockwood Legislative Committee on Housing, Legislative Document 1922, page 224.

[8] Matter of Importers and Exporters Insurance Co. v. Rhoades, 239 N. Y. 420 at page 424.

Appendix A

In my opinion the position of NYFIRO on the question of partial subscribership cannot be sustained. The language of Section 181(4) is clear and unequivocal. Any rule or regulation of NYFIRO inconsistent with the plain guarantee of the right of partial subscribership as set out in Section 181(4), would have to be rejected. However, I do not find that the 1948 amendments to the constitution or the constitution itself are inconsistent with the plain mandate of Section 181(4). On the contrary they, too, clearly provide for the right of partial subscribership contemplated by Section 181(4) of the Insurance Law. Although the language of Section 181(4) is so clear that it is not necessary to seek out the legislative intent, it is noted in connection with the language of the Merritt and Lockwood reports relied upon by NYFIRO, that former Superintendent Robert E. Dineen had the following to say:[9]

> "The Department does not know whether the Merritt and Lockwood Committees of the Legislature ever contemplated that action in concert by insurers would reach the point that it has in New York State today. In spite of the fact that the Superintendent of Insurance is vested with power to disapprove any rates which are excessive, inadequate, unfairly discriminatory or otherwise unreasonable, some people believe that the pendulum has swung too far in this state and that the public interest would be better served by more competition among the companies on a price basis."

[9] 88th Preliminary Report of Superintendent of Insurance to the 1947 Legislature at page 10.

Likewise attention is directed to the purpose section[10] of Article VIII which specifically provides:

> "The purpose of this article is to promote the public Welfare by regulating insurance rates to the end that they shall not be excessive, inadequate, unfairly discriminatory or otherwise unreasonable and to authorize and regulate cooperative action among insurers in rate making and in other matters within the scope of this article. Nothing in this article is intended (1) to prohibit or discourage reasonable competition, or (2) to prohibit or encourage except to the extent necessary to accomplish the aforementioned purpose, uniformity in insurance rates, rating systems, rating plans or practices. This article shall be liberally interpreted to carry into effect the provisions of this section".

The report of the Joint Legislative Committee on Insurance Rates and Regulation included the following commentary:[11]

> "As stated in the report of May 23, 1946 of the Subcommittee of the Committee on Rates and Rating Organizations of the National Association of Insurance Commissioners the purpose 'becomes clear when read in the light of the congressional debate preceding the enactment of U. S. Public Law 15, the reports of the various congressional committees in connection with that bill, particularly Report

[10] Section 180(1) of the Insurance Law.

[11] Legislative Document 1948 #46, pages 53, 54.

No. 143 of the House of Representatives dated February 13, 1945, and the law itself. These sources of material indicate quite plainly that Congress was willing to permit cooperative action, including price-fixing, in the insurance business on a state level providing such activity was regulated and at the same time was interested in seeing to it that reasonable competition was preserved. It was felt that the insertion of a purpose clause together with a provision calling for a liberal interpretation of the bill would serve as a guide for state administrators in interpreting and enforcing the new law'."

2. While it is clear that the North America Companies have the right of partial subscribership it remains to be considered whether they can copy NYFIRO dwelling class rate filings, adopt them as their own and file them as independent insurers with this Department.

NYFIRO argues *inter alia* that it has a common law copyright and property right in its dwelling class rate filings because they are the result of considerable work and expense on its part. There is no question that NYFIRO has expended large sums in the development of its dwelling class rating system including the preparation and maintenance of the town list. On the other hand this Department is not a court of law. It cannot assess civil damages against insurers doing business in this State and its injunctive powers are limited.[12] It should also be noted that the North

[12] See Article IX D (Sections 270-282) Insurance Law in respect to the powers of the Superintendent to deal with certain defined and undefined unfair and deceptive acts and practices.

America Companies have offered to pay NYFIRO the reasonable value of any NYFIRO data used by them and that the offer has been refused.

NYFIRO takes the position that it is entitled and required to determine who will use its work product and expresses the belief that the Rating Law itself prohibits NYFIRO from selling its services to non-members or non-subscribers on the ground that such sale would result, among other things, in an unwarranted evasion of the deviation section of the New York Rating Law.[13]

The provisions for deviations are applicable to insurers as members of or subscribers to a rating organization. An insurer which files independently is not subject to the provisions for deviations.

Since this Department does not have the power of a court of law, I will make no specific comment on what damages, if any, may be recovered by NYFIRO against the North America Companies on account of the appropriation by the North America Companies of the dwelling class rate filings of NYFIRO. Suffice it to say that this Department does not have jurisdiction over such a claim. Indeed NYFIRO does not seek damages here but petitions the Superintendent to define the action of the North America Companies in making their December 7, 1953 dwelling class filing as an unfair trade practice as provided in

[13] Section 185. This section, in substance, requires adherence by members and subscribers to rating organizations, to rates filed on their behalf by the rating organization unless the deviation procedure outlined in the section is followed and the rating organization be afforded an opportunity of a hearing on the matter

Section 278 of Article IX D and to find that the North America Companies are in fact engaged in unfair competition and unfair trade practices.

In other words and stripped of all except essentials, NYFIRO charges that the December 7, 1953 action of the North American Companies is in violation of its property rights; is not in compliance with the New York Rating Law and constitutes an unfair trade practice and unfair competition. NYFIRO asks this Department to so find and to take appropriate action under the applicable provisions of the Rating Law and Article IX D which provides for dealing with unfair and deceptive acts and practices.

In order to determine whether Article IX D is applicable to the case at hand it is first necessary to examine Article VIII to ascertain if Article VIII permits the action taken by the North America Companies. It is obvious that if such action is permitted by the rating article of the Insurance Law it could not be unfair competition or an unfair and deceptive act or practice under another article of the same law.

Prior to amendment in 1948 Section 184, Subsection 3 of Article VIII of the Insurance Law read:

> "No insurer shall file any rate manual or schedule of rates of any rating organization except as a member or subscriber thereof."

In 1948 this subsection was deleted and a new subsection substituted which now provides:

> "Nothing herein contained shall be construed as requiring any insurer to become a member

of or subscriber to any rating organization. Except to the extent necessary to meet the provisions of paragraphs (b) and (c) of subsection one of section one hundred eighty-three, uniformity among insurers in any matters within the scope of sections one-hundred eighty-three and one-hundred eighty-four is neither required nor prohibited."

In commenting upon this change the Joint Legislative Committee stated:[14]

"The first sentence provides that no insurer is required to associate with a rating organization.

"The second sentence as explained by the N. A. I. C. Sub-Committee 'is incorporated in the bill to implement directly . . . the purpose clause. In drafting these bills it was recognized that many companies desired to take independent action. It was recognized that uniformity while authorized should not be mandatory, thereby preserving freedom of action upon the part of those who desire to take action independently.'

"The All-Industry Committee added that the second sentence 'makes it clear that except to the extent necessary to meet the standards, the bill does not require or prohibit uniformity among insurers in any matters within the scope of this section'."

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[14] Report of Joint Legislative Committee on Insurance Rates and Regulation, Legislative Document 1948 (#46) page 70.

Appendix A

Section 184 Subsection 4 of Article VIII was also extensively amended in 1948 and now reads:

"The superintendent shall review filings as soon as reasonably possible after they have been made in order to determine whether they meet the requirements of this article. When a filing is not accompanied by the information upon which the insurer supports such filing, and the superintendent does not have sufficient information to determine whether such filing meets the requirements of this article, he shall require such insurer to furnish the information upon which it supports such filing and in such event the waiting period shall commence as of the date such information is furnished. The information furnished in support of a filing may include (1) the experience or judgment of the insurer or rating organization making the filing, (2) its interpretation of any statistical data it relies upon, (3) the experience of other insurers or rating organizations, or (4) any other relevant factors. Subject to the exceptions specified in subsection eight of this section, each filing shall be subject to a waiting period of fifteen days, which period may be extended by the supertendent for an additional period not to exceed fifteen days if he gives notice within such waiting period to the insurer or rating organization which made the filing that he needs such additional time for the consideration of such filing. The superintendent may authorize a filing that he has reviewed to become effective before the expiration of the waiting

period or any extension thereof. A filing shall be deemed to meet the requirements of this article unless disapproved by the superintendent within the waiting period or any extension thereof. A filing and any supporting information shall be open to public inspection after the filing becomes effective."

The comments of the Joint Legislative Committee, which are in substance a quote from the minutes of the Commissioners-All Industry Committee, state:[15]

" 'This section as amended is not intended to give the filer the right to produce merely some, if (sic "but") not all, of the information upon which he relies.

" 'It contemplates a good faith effort to give the Commissioner that which he has to have, i.e., a revealing explanation of the filing—what statistics, if any, are relied upon; the interpretation placed upon such statistics by the filer; the filer's reasons for using this interpretation and the basis for the filer's belief that the filing should be allowed to become effective. A fair showing should be made that the rate has been made in accordance with the provisions of the Act—including the provision that due consideration has been given to past and prospective loss experience and the other factors referred to.

" 'In other words, the net effect of this change is to make clear that statistical data on file

[15] Report of Joint Legislative Committee on Insurance Rates and Regulation, Legislative Document 1948 (#46) Page 72.

at the Commissioner's office, or otherwise accessible to him in accordance with the provisions of Section 13, need not be refiled as a part of each filing. It makes clear that pertinent explanatory material need not be duplicated time and again but may be referred to by specific reference. However, these clarifications are not intended to, and do not, change the obligation of the filer to explain his filings and to disclose his interpretation of the data upon which he relies. The categories of information which may be relied upon are illustrated, but the categories are not mutually exclusive. The Commissioner is not given a choice, to obtain information or not obtain information as he sees fit, but is under a duty to require supporting information if he does not have sufficient information.' "

It is also of interest to note language appearing in that part of an Explanatory Memorandum prepared by the All-Industry Committee dealing with the rate filing section of the Commissioners-All Industry Casualty and Surety Rate Regulatory Bill.[16]

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[16] Explanatory Memorandum of October 23, 1946 at page 6. Although this memorandum dealt with the Casualty and Surety rating bill, the section being considered was substantially identical with that of the Commissioners—All Industry Fire, Marine and Inland Marine rate regulatory bill. Section 4 (a) of both bills as further liberalized by amendments agreed to by the All Industry Committee on January 24, 1947 remained substantially identical with each other. Both subsections, as amended, are substantially incorporated in Section 184 of the Insurance Law, particularly Section 184 subsection 4.

Appendix A

"Section 4-Rate Filings

"Subsection (a) provides for rate filings with the Commissioner, together with the information upon which the filings are supported. The source and character of the information are not prescribed and any pertinent information supporting the filing may be submitted. An insurer which makes its own filings, or a rating organization, may utilize to the extent applicable any information filed by others in support of their filings."

Article V of the Constitution of NYFIRO provides:

"An insurer, not a Member of this Rating Organization, authorized to transact the business of fire insurance in the State of New York, may apply for and receive as a *Subscriber* the service furnished by the Rating Organization by complying with the provisions of Article IV hereof . . ."

By-Law 12 of NYFIRO is entitled "Property Rights" and Section 2 states in part:

"Rights and Liabilities Upon Withdrawal:
"In the event that any Member or Subscriber of the Rating Organization shall cease to be a Member or Subscriber thereof, all interest of such Member or Subscriber in the Rating Organization or any of its assets and property shall immediately cease and terminate . . ."

By-Law 13 of NYFIRO is entitled "Ownership of Publications, etc." and it states:

"Surveys, rate books, tariffs and other publications, and cabinets, cards and matter supplied by the Rating Organization are and shall remain the property of the Rating Organization, and title thereto shall remain vested in the Rating Organization. It is a condition of membership and of subscribership that all such publications, cabinets and matter are only loaned to the Member or Subscriber during continuance of membership or of subscribership; and no payments made to the Rating Organization by way of dues, assessments, charges or otherwise, shall establish a proprietary interest therein. Upon termination of membership or of subscribership, whether by resignation or expulsion, the Member or Subscriber shall, if so requested, at once cause to be returned to the Rating Organization all surveys, rate books, tariffs, and other publications, and cabinets, cards and matter previously supplied."

Thus the question presents itself: Do the above quoted sections of the rating article entitle the North America Companies to file as independents, rates for the dwelling classes identical to those of NYFIRO? I think the answer must be in the affirmative. First, in 1948 the rating article was amended so that it does not now prohibit an independent insurer from filing rates which are uniform with those filed by a rating organization. (Section 184(3), Insurance Law). Secondly, in 1948 the rating article was further amended to permit an independent insurer to use any supporting data filed by a rating organization in making

independent rate filings. (Section 184(4), Insurance Law). Since the law now permits the use by an independent insurer of all supporting information filed by a rating organization to support the rate filings made by such rating organization it must follow that the law permits the use by an independent insurer of an end result of the supporting data, namely, the rate filings themselves. In reaching this conclusion it is recognized that the rating article does not require an independent insurer which uses the supporting data of a rating organization to duplicate the rate filings of such rating organization.

While I do not believe that the above quoted excerpts from the NYFIRO Constitution and By-Laws are intended to apply to more than the physical return of the data referred to, if they are in derogation of my conclusion, as stated herein, they should be appropriately amended.

Cases cited by NYFIRO dealing with common law copyright and property rights in a work product even as public as "news"[17] are inapplicable because they do not involve a statute similar to Article VIII of the Insurance Law.

The Canadian case[18] while seemingly in point at first glance, suffers the same deficiency since no such provisions as those contained in Article VIII of our Insurance Law were present in the Canadian Law, construed in that case. The other cases

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[17] International News Service v. Associated Press, 248 U. S. 215, 39 Sup. Ct. 68 (1918).

[18] Underwriters' Survey Bureau Ltd. et al. v. Massie & Renwick Ltd. (1940), 1 D. L. R. 625, S. C. R. 218.

cited by NYFIRO are likewise distinguishable because they do not deal with data open to public inspection under the provisions of laws similar to that of the rating article of our Insurance Law.

It is not easy for anyone who respects property rights to conclude that they can be rightfully appropriated without the consent of the owner, especially by a competitor. Were it not for the plain mandate of the rating article reinforced by the legislative and economic philosophy evidenced by the Congress of the United States in the anti-trust laws and Public Law 15, and by the New York Legislature in the Donnelly Act,[19] as amended, my conclusion may have been otherwise. However, examination of the legislative history and pattern since the South-Eastern Underwriters' case compels me to conclude that our legislature in enacting Article VIII, as amended in 1948, intended to encourage and facilitate reasonable competition in fire and casualty insurance. To accomplish this objective the legislature (1) stated unequivocally that nothing in the law was to prohibit or to discourage reasonable competition,[20] (2) enacted elaborate safeguards for the right of deviation, appeal by a minority, partial subscribership and independent action,[21] (3) provided that an independent insurer might justify its rate filings by the experience of other insurers or rating organizations, as well as by any other

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[19] General Business Law, Article 22—Section 340.

[20] Article VIII Insurance Law, Section 180(1).

[21] Article VIII Insurance Law, Section 185(4) Section 184 (11). Section 181(4) and Section 184(3).

relevant factors,[22] and (4) stipulated that any rate filing and any supporting information shall be open to public inspection after the effective date.[22] It is recognized both by NYFIRO in its letter requesting this hearing and by the Insurance Department that the filing under review herein is merely a precursor of further independent and competitive action by the North America Companies in the dwelling class fire field. It is therefore my conclusion that the actions of the North America Companies complained about herein are proper under Article VIII of the Insurance Law and accordingly not within the scope of Article IX-D.

It is also noted that in the casualty insurance field there are a number of partial subscribers to casualty rating organizations and that a number of independents have filed the rating manuals of a casualty insurance rating organization. It is further recognized that NYFIRO itself furnishes without cost rating data to other rating organizations pursuant to a section of Article VIII[23] which provides:

> "Cooperation among rating organizations or among rating organizations and insurers in rate making or in other matters within the scope of this article is hereby authorized, provided the filings resulting from such cooperation are subject to all the provisions of this article which are applicable to filings generally."

NYFIRO points out however that its fire rating systems are much more complex and expensive

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[22] Article VIII Insurance Law, Section 184(4).

[23] Article VIII Insurance Law, Section 181(10).

to develop and maintain than casualty rating plans and that the rating data furnished to the other rating organizations is with its consent. Admittedly fire rating is more complex and expensive overall than casualty rating but the main expense is in connection with schedule rated risks and as we have noted, practically all of the risks in the dwelling classes are class rated. In that respect they are similar to casualty risks. It also should be pointed out that the same section[24] under which NYFIRO cooperate with other rating organizations permits cooperation with independent insurers.

In treating separately the issue of partial subscribership and the issue of the use of NYFIRO's rate filings for the dwelling classes I have not been unmindful of the relationship, particularly in the fire field, of these issues one to another. To permit partial subscribership and to deny to the partial subscriber access to and utilization of sources of data to support his independent filing would be an obvious frustration of legislative intent. To require a partial subscriber to evolve at its own expense a town list might likewise set at nought a legislative mandate that competition shall not be prohibited or discouraged. It was entirely logical that the legislature provided in express terms that all data submitted to support rates be open to public inspection and that this data could be used by an independent insurer.

It is too well settled to require citation that our anti-trust laws were in part designed to prevent the evils which flow from price fixing and the

[24] Article VIII Insurance Law, Section 181 (10).

restraint of trade or competition. The insurance industry in connection with S. E. U. A. at first sought and failed in its effort to obtain a complete exemption from the federal anti-trust laws.[25] Public Law 15 is only a partial exemption in that it makes the anti-trust laws applicable "to the extent that such business is not regulated by state law." Even this exemption is subject to the further exception to the effect that nothing in Public Law 15 shall render the Sherman Act inapplicable "to any agreement to boycott, coerce or intimidate or effect boycott, coercion or intimidation."

It is of course recognized that one of the purposes of Public Law 15 was to permit insurers, under the regulation of the several states, to act in concert in rate making.[26] Such activity would be illegal under the Sherman Act. It was properly recognized by Congress that insurance is unique in that its cost cannot be exactly determined at the time of its sale since such cost depends upon future events which may or may not occur. Thus when insurers band together to make rates they also pool their experience with the result that the greater the experience base the more accurate the rate determination for the future.

On the other hand nowhere has our attention been drawn to any statement by any responsible person that Public Law 15 and the All-Industry

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[25] 78th Congress, 1st Session.
H. R. 3269 Hancock bill.
H. R. 3270 Walter bill.
S. 1362 Bailey-Van Nuys bill.

[26] See Comments of Senator Homer Ferguson of Michigan, 91 Congressional Record 1481.

bills were intended to continue either a practical or a theoretical monopoly by the local fire rating organizations of fire rating services. We have already reviewed and discussed those sections of our rating law which specifically provide for reasonable competition. Likewise we have discussed the legislative background and intent of such provisions. We should also point out that in this State this Department during the period which followed the S. E. U. A. case and specifically in connection with the 1948 amendments to Article VIII of our Insurance Law hereinbefore referred to, made its position clear on the question of reasonable competition.[27] [28]

As stated herein, my conclusions are dictated by the belief that the Congress of the United States and the New York Legislature intended that reasonable competition should exist in the fire insurance business. To my way of thinking the action of the North America Companies is reasonably calculated to achieve that and it is contemplated and permitted by our Insurance Law.

There remain to be considered some other points:

A. The claim by NYFIRO that the approval of the action of the North America Companies will result in rate wars and chaos completely overlooks the rating standards of our Insurance Law,

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[27] 88th Preliminary Report of Superintendent of Insurance to the 1947 Legislature.

[28] "The Case for the All-Industry Bill", a speech by former Superintendent Robert E. Dineen of New York State Insurance Department before the National Association of Independent Insurers at Chicago, Ill., October 19, 1946, pp. 36-37.

namely, that rates must be among other things adequate. It is the intention of this Department to see that the rating standards of our Insurance Law are observed by insurers doing business in this State.

B. The argument of the North America Companies that NYFIRO and the intervening insurers are not aggrieved parties and that the superintendent has no power to call this hearing is without merit and the motion to dismiss this proceeding for lack of jurisdiction is denied.

(Signed) Joseph F. Murphy
Deputy Superintendent

Dated: New York, N. Y.
September 14, 1954

The Superintendent of Insurance hereby adopts and approves the determination hereinbefore made by Deputy Superintendent Joseph F. Murphy.

(Signed) Alfred J. Bohlinger
Superintendent of Insurance

Dated: New York, N. Y.
September 14, 1954

APPENDIX B

Order Transferring Proceeding to Appellate Division

NEW YORK SUPREME COURT

COUNTY OF NEW YORK

SPECIAL TERM—PART I

Index No. 13581 Year 1954

In the Matter of the Application

of

CHARLES P. CULLEN, as Treasurer of NEW YORK FIRE INSURANCE RATING ORGANIZATION, AGRICULTURAL INSURANCE COMPANY, ET AL.,

Petitioners,

For an Order Pursuant to Article 78 of the Civil Practice Act

against

ALFRED J. BOHLINGER, as Superintendent of Insurance of the State of New York, INSURANCE COMPANY OF NORTH AMERICA and PHILADELPHIA FIRE AND MARINE INSURANCE COMPANY,

Respondents.

Appendix B

Present:

HON. FELIX C. BENVENGA,

Justice.

The following papers numbered 1 to10 read on this motion heard—transferred to AD on October 18, 1954.

Calendar No. 119

	Papers Numbered
Order to Show Cause and Affidavits Annexed & Exhibits	1 to 10

Upon the foregoing papers this motion is transferred to the Appellate Division, First Department.

Filed
Oct 18 1954
New York
Co. Clerk's Office

Dated Oct 18 1954

F. C. B.
J. S. C.

APPENDIX C

Order of Appellate Division, Dated November 30, 1954, Confirming Appellee's Determination, Reported at 284 App. Div. 963 Case No. 2

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 30th day of November, 1954.

Present:

HON. EDWARD S. DORE, *Justice Presiding,*
" JOSEPH M. CALLAHAN,
" EARLE C. BASTOW,
" BERNARD BOTEIN,
" FRANCIS BERGAN,
Justices.

In the Matter of the Application

of

CHARLES P. CULLEN, as Treasurer of NEW YORK FIRE INSURANCE RATING ORGANIZATION, AGRICULTURAL INSURANCE COMPANY, ET AL.,

Petitioners,

For an Order Pursuant to Article 78 of the Civil Practice Act

against

ALFRED J. BOHLINGER, as Superintendent of Insurance of the State of New York, INSURANCE COMPANY OF NORTH AMERICA and PHILADELPHIA FIRE AND MARINE INSURANCE COMPANY,

Respondents.

Appendix C

The above named petitioners having moved at a Special Term of the Supreme Court, New York County, pursuant to Article 78 of the Civil Practice Act, for a review by the court of the determination of the respondent, Alfred J. Bohlinger, as Superintendent of Insurance of the State of New York, dated September 14, 1954, and for other relief; and all proceedings thereupon had in said court, together with all the papers upon which the same are based, having been transferred by order of said court, entered on the 18th day of October, 1954, to this Court for review and determination; and the said proceeding coming on to be heard, and having been argued by Mr. Abraham Kaplan of counsel for the petitioners, by Mr. Ralph M. Carson of counsel for the respondent Insurance Companies, by Mr. Samuel A. Hirshowitz of counsel for the respondent Superintendent of Insurance, and briefs amicus curiae having been filed on behalf of the New York State Association of Insurance Agents, Inc., and by the National Association of Independent Insurers, Inc.; and due deliberation having been had thereon,

It is hereby unanimously ordered that the said determination be and the same hereby is confirmed with $50 costs and disbursements to the respondents and the proceeding dismissed.

ENTER

GEORGE T. CAMPBELL,
Clerk.

APPENDIX D

Order of Court of Appeals Dated January 13, 1955, Denying Appellants' Motion for Leave to Appeal Thereto

STATE OF NEW YORK

IN

COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the thirteenth day of January A. D. 1955.

PRESENT,

HON. ALBERT CONWAY,

Chief Judge, presiding.

Mo. No. 18

In the Matter of

the Application of CHARLES P. CULLEN, as Treasurer of New York Fire Insurance Rating Organization, AGRICULTURAL INSURANCE COMPANY, & ors.,

Appellants.

For an Order & c.

vs.

ALFRED J. BOHLINGER, as Superintendent of Insurance of the State of New York, & ors.,

Respondents.

Appendix D

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

s/ GEARON KIMBALL,
Deputy Clerk.

APPENDIX E

Order of Court of Appeals Dated April 12, 1955, Dismissing Appellants' Appeal as of Right, Reported in 308 N. Y. 886

STATE OF NEW YORK

IN

COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twelfth day of April A. D. 1955.

PRESENT,

HON. ALBERT CONWAY,

Chief Judge, presiding.

Mo. No. 177

In the Matter of

the Application of CHARLES P. CULLEN, as Treasurer of New York Fire Insurance Rating Organization, & ors.,

Appellants,

For an Order &c.

vs.

ALFRED J. BOHLINGER, as Superintendent of Insurance of the State of New York, & ors.,

Respondents.

Appendix E

A motion having heretofore been made herein upon the part of the appellants for extension of the time within which to file the return on appeal herein or, in the alternative, for an order vacating the notice of appeal to this Court, dated January 27, 1955, and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied. Upon the Court's own motion the appeal taken as of right dismissed upon the ground that, on this record, no substantial constitutional question has been presented.

S/ GEARON KIMBALL,
Deputy Clerk.

APPENDIX F

Section 184(4) of New York Insurance Law

§184(4). The superintendent shall review filings as soon as reasonably possible after they have been made in order to determine whether they meet the requirements of this article. When a filing is not accompanied by the information upon which the insurer supports such filing, and the superintendent does not have sufficient information to determine whether such filing meets the requirements of this article, he shall require such insurer to furnish the information upon which it supports such filing and in such event the waiting period shall commence as of the date such information is furnished. The information furnished in support of a filing may include (1) the experience or judgment of the insurer or rating organization making the filing, (2) its interpretation of any statistical data it relies upon, (3) the experience of other insurers or rating organizations, or (4) any other relevant factors. Subject to the exceptions specified in subsection eight of this section, each filing shall be subject to a waiting period of fifteen days, which period may be extended by the superintendent for an additional period not to exceed fifteen days if he gives notice within such waiting period to the insurer or rating organization which made the filing that he needs such additional time for the consideration of such filing. The superintendent may authorize a filing that he has reviewed to become effective before the expiration of the waiting period or any extension thereof. A filing shall be deemed to meet the requirements of this article unless disapproved by the superintendent within the waiting period or any extension thereof. A filing and any supporting information shall be open to public inspection after the filing becomes effective.

APPENDIX G

Section 184(1) of New York Insurance Law

§184(1). Every rating organization and every authorized insurer shall file with the superintendent, except as to inland marine risks which by general custom of the business are not written according to manual rates or rating plans, every rate manual, schedule of rates, classification of risks, rating plan, and every other rating rule and every modification of any of the foregoing which it proposes to use. Specific inland marine rates on risks specially rated by a rating organization shall be filed with the superintendent. An insurer may satisfy its obligation to make such filings for any kind or type of insurance by becoming a member of or subscriber to a rating organization which makes such filings for such kind or type of insurance, and by authorizing the superintendent to accept such filings of the rating organization on such insurer's behalf.

JUL 1 1955
HAROLD B. WILLEY, Clerk

No. 121

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

CHARLES P. CULLEN, as Treasurer of NEW YORK FIRE INSURANCE RATING ORGANIZATION, *et al.*,

Appellants,

v.

ALFRED J. BOHLINGER, as Superintendent of INSURANCE OF THE STATE OF NEW YORK, INSURANCE COMPANY OF NORTH AMERICA, *et al.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE APPELLATE DIVISION OF THE SUPREME COURT, FIRST DEPARTMENT OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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Philadelphia, Penna.

Counsel for Appellees Insurance Company of North America and Philadelphia Fire and Marine Insurance Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

CHARLES P. CULLEN, as Treasurer of NEW YORK FIRE INSURANCE RATING ORGANIZATION, *et al.*,

Appellants,

v.

ALFRED J. BOHLINGER, as Superintendent of INSURANCE OF THE STATE OF NEW YORK, INSURANCE COMPANY OF NORTH AMERICA, *et al.*,

Appellees.

No. 121

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE APPELLATE DIVISION OF THE SUPREME COURT, FIRST DEPARTMENT OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Appellees Insurance Company of North America and Philadelphia Fire and Marine Insurance Company (herein called "appellees North America"), pursuant to Rule 16 of this Court, move that the appeals from final orders of the Court of Appeals of the State of New York and of the Appellate Division of the Supreme Court, First Department of the State of New York, be dismissed, or that the final orders of those courts be affirmed, on the ground that the appeals do not present a substantial Federal question,

that the orders appealed from rest on an adequate non-Federal basis, and that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

ORDERS AND OPINION BELOW

The decision of which appellants complain is reflected in an extensive and fully-considered opinion of the Deputy Superintendent of Insurance of the State of New York, adopted and approved by the Superintendent of Insurance on September 14 1945 (not reported but reproduced as App. A of Jurisdictional Statement).

The order of the Appellate Division First Department (App. C of Jurisdictional Statement), unanimously confirming that determination of the Superintendent of Insurance, was entered November 30 1954 and is reported at 284 App. Div. 963. The order of the Court of Appeals denying leave to appeal (App. D of Jurisdictional Statement) was entered January 13 1955 and is not yet reported. The order of the Court of Appeals dismissing the appeal as of right for lack of substantial constitutional questions (App. E of Jurisdictional Statement) was entered April 12 1955 and is reported at 308 NY 886.

The decision of the Superintendent treated the issues so thoroughly that neither the Appellate Division nor the Court of Appeals found an opinion necessary.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC § 1257(2), the orders of the Court of Appeals and Appellate Division First Department, from which the appeals are taken, having been entered as stated above.

No constitutional question was raised by appellants in the proceedings before the Superintendent of Insurance,

and the opinion does not discuss any issues of constitutional law. In their petition to review the Superintendent's determination, appellants did note a constitutional objection as to two of 16 alleged errors, but the Appellate Division in unanimously confirming the Superintendent without opinion did not rule specifically upon those alleged constitutional errors and it is obvious from a reading of the Superintendent's opinion that it is based entirely upon local law having no constitutional implications. The Court of Appeals of the State expressly recognized this in dismissing appellants' appeal to that Court, on the Court's own motion, on the ground that "on this record, no substantial constitutional question has been presented" (308 NY 886).

QUESTION PRESENTED

Whether provisions of the New York Insurance Law permitting appellees North America to make fire insurance rates for dwellings independently of the concerted rate-making activity of appellant rating organization, on the basis in whole or in part of material required to be publicly filed by the rating organization with the Insurance Department, violate the due process clause of Section 1 of the 14th Amendment to the United States Constitution.

STATUTES INVOLVED

Sections 181(5), 184(1) and 184(4) of the New York Insurance Law are set forth in Appendices H, G and F, respectively, of the Jurisdictional Statement. Sections 180(1) and 184(3) of the Insurance Law are set forth in Appendices I and II hereto. These Sections are part of Article VIII of the Insurance Law, entitled "Rates and Rating Organizations". The determination of the Superintendent of Insurance was based, not upon Section

184(4) alone, as alleged by appellants, but rather upon a consideration of several related Sections of Article VIII including Sections 180(1) and 184(3).

STATEMENT

In the decision under review, the Superintendent of Insurance held (1) that the appellees North America had the right under the New York Insurance Law to withdraw their subscribership to the concerted rate-making activity of the appellant New York Fire Insurance Rating Organization for the dwelling classes of fire insurance and thus remain partial subscribers only, and (2) that appellees North America as partial subscribers had the right under the New York law to make an independent rate filing for the dwelling classes, on the basis of material required to be publicly filed with the Insurance Department by the rating organization.

Appellees North America are Pennsylvania corporations licensed to do business in New York (fols. 128-9*). The parent, Insurance Company of North America, was organized in 1792 and incorporated in 1794 as a capital stock fire and marine insurance company. In 1953 these companies wrote 2.6% of the total of all fire and allied lines of insurance written in New York State (this computation was made by us from material on record and publicly filed with the Superintendent of Insurance).

Appellant New York Fire Insurance Rating Organization is an incorporated association organized and licensed under the State Insurance Law to make fire insurance rates for its members and subscribers in the State of New York

*Folio references are to the printed record in the Appellate Division First Department, which has been certified and filed in the Office of the Clerk of this Court.

(fols. 116, 129, 194, 207, 342). The 50 appellant insurance companies are members of the rating organization engaged in the business of fire insurance in New York (fols. 195, 1085-1097). There are 128 other stock fire insurance companies which are members of the rating organization, and 81 insurance companies which are subscribers to its services (fols. 131, 342).

Members and subscribers of the rating organization write about 90% of the fire and allied lines of insurance in New York (fol. 209).

On December 7 1953 appellees North America notified the rating organization by letter that they thereby terminated as of March 1 1954 their subscribership to rating services for the dwelling classes of fire insurance (fols. 1549-1551). Such rating services included rates for fire, extended coverage, additional extended coverage, wind storm and hail, vandalism and malicious mischief and time element coverages.

On the same day appellees North America terminated their prior authorization to the Superintendent of Insurance to accept filings from the rating organization in their behalf for the dwelling classes (fols. 200, 1549-1551), and simultaneously filed with the Insurance Department rates, rules and forms for the dwelling classes substantially identical with those filed by the rating organization in behalf of its members and subscribers, with the request that such independent filing be approved for use on and after March 1 1954 (Exs. 19-29).

Upon the request of the rating organization, the Insurance Department held hearings February 25 and 26 and March 5 1954, and gave the parties full opportunity to elicit evidence. After receipt of briefs and long consideration the Deputy Superintendent rendered his opinion, which

was approved by the Superintendent on September 14 1954.

On September 30 1954 appellees North America filed independently with the Insurance Department new rates, rules and forms for the dwelling classes. These new rates were on the average approximately 10% below the rates for the same classes filed by the rating organization, and the new policies contained appropriate coverage and simplified forms. In accordance with the Insurance Law the Superintendent approved these independent filings on October 4 1954, to be effective October 20 1954.

Appellants on October 21 1954 obtained a temporary stay from Justice Breitel of the Appellate Division of the Supreme Court, First Department, preventing appellee North America from continuing use of its independent fire insuranec rates which had so become effective, and requiring appellee North America to raise its rates for dwelling insurance so as to be identical with those made by the rating organization. This stay was lifted on November 30 1954 by the entry of the Appellate Division's order unanimously confirming the decision of the Superintendent of Insurance. Appellants' further application for a stay was denied by Chief Judge Conway of the Court of Appeals on December 20 1954. A still further stay application of appellants was denied by the full Court of Appeals on January 13 1954. Finally on April 7 1955, Chief Judge Conway again refused a stay of appellees North America's independent rates requested by appellants in connection with the appeal on alleged constitutional grounds in the Court of Appeals.

ARGUMENT

Appellants' three notices of appeal to this Court and the Judisdictional Statement served June 1 1955 state no

question of Federal law of sufficient substance to be reviewed by this Court. The orders appealed from rest on an adequate non-Federal basis. The alleged constitutional issues raised by appellants are so entirely lacking in merit that they require no further argument.

Appellants contend that the Insurance Law of New York State offends the Federal Constitution in that it deprives the appellants of their property without due process of law. It is argued that the rating organization has a property right in the material which it uses to make and support its rate filings; that the Superintendent of Insurance applied New York law as permitting the North America Companies to use that material in making and supporting their independent filings; that no compensation for such use is provided for by statute, and it therefore unconstitutionally deprived appellants of their property.

I.

Appellants' contentions run directly counter to well-established principles of legitimate State regulation. Under the police power a State may, without violating the 14th Amendment, properly enact regulatory laws which permit and encourage independent rate-making, in order to prevent monopoly and promote competition in insurance rating. *German Alliance Insurance Company* v. *Hale* 219 US 307.

Section 184(4) and related provisions of the Insurance Law of New York are just such regulatory statutes. They are designed to preserve and facilitate independent competitive action on the part of those insurance companies which do not wish to join in the concerted rate-making activity of the appellant rating organization. The rating organization has a limited license under the New York regulatory statute to engage, on a voluntary basis, in price-fixing which would be illegal but for this license. Under the same law,

appellees North America have the right to make independent rates and may not be coerced into joining the price-fixing activities of the rating organization. As part of the regulatory scheme designed to preserve and facilitate independent competitive rates, and as a condition of legalizing the voluntary rate-fixing operations of the rating organization, the New York statute requires all rate filings and supporting information to be placed in the public domain for the use of all.

In *United States* v. *South-Eastern Underwriters Association* 322 US 533, the concerted rate-making activity of an organization almost identical to appellant rating organization was held to be illegal, in accordance with the long line of decisions holding illegal *per se* all price-fixing arrangements. *Kiefer-Stewart Co.* v. *Seagram & Sons* 340 US 211, 212; *United States* v. *Real Estate Boards* 339 US 485, 489; *United States* v. *Socony-Vacuum Oil Co.* 310 US 150, 218; *United States* v. *Trenton Potteries Co.* 273 US 392. Thereafter Congress by Public Law 15 declared that the Federal antitrust laws should govern the insurance business "to the extent that such business is not regulated by State law" (15 USC § 1012[b]), but that in no event should "boycott, coercion, or intimidation" be exempted (15 USC § 1013[b]).

As a result of these developments, in 1948 New York amended its Insurance Law so as to establish the regulatory plan now under review. This plan represents a balance between the legalization of voluntary rate-fixing, especially regulated and thereby exempted from the Federal antitrust laws, and the desire expressed in the Insurance Law to maintain reasonable competition. Appellant rating organization is but a creature of the Insurance Law and exists only by the combined grace of the Legislatures of the State of New York and the United States. Absent the enabling statutes of these bodies, the rating organization

is illegal. *United States* v. *South-Eastern Underwriters Association* 322 US 533. It should not be heard to complain, therefore, that the statute giving it life and breath conditions its continued existence on, among other things, placing in the public realm its rate filings with supporting information, and authorizing an insurer to file independent rates supported by the filings of the rating organization for the same classes of insurance.

The Superintendent of Insurance made it clear that his decision was based upon the finding that the purpose of the New York Legislature in enacting Section 184(4) and related provisions of the Insurance Law was to encourage and facilitate reasonable competition in insurance. (App. A, Jurisdictional Statement, pp. 50-54). He quoted Section 180(1) of the Insurance Law, which specifically provides that nothing in the rate regulatory law is intended to "prohibit or discourage reasonable competition" or "to prohibit or encourage . . . uniformity in insurance rates". He made it plain that authorizing independent rate filings, based in whole or in part on material of the rating organization and others, was part of the plan for facilitating price competition. He noted that Section 184(3) had been amended in 1948 so as to delete a prohibition against use of a rating organization's rate schedules or manuals by an independent insurer, and to provide specifically instead that uniformity is neither required nor prohibited (App. A, Jurisdictional Statement, pp. 42-3, 48). He likewise pointed to the amendment of Section 184(4) in 1948 which provided that a "filing and any supporting information shall be open to public inspection after the filing becomes effective" (App. A, Jurisdictional Statement, pp. 45, 48-9)*

*Under New York law, material filed and open to public inspection is public property and may be copied for any purpose. *People* v.

Tracing the history of these 1948 amendments to the New York Insurance Law (App. A, Jurisdictional Statement, pp. 50-54), the Superintendent concluded (p. 54):

> "As stated herein, my conclusions are dictated by the belief that the Congress of the United States and the New York Legislature intended that reasonable competition should exist in the fire insurance business. To my way of thinking the action of the North America Companies is reasonably calculated to achieve that and it is contemplated and permitted by our Insurance Law."

The New York statute here in question is precisely the type of regulation which was upheld in *German Alliance Insurance Co.* v. *Hale* 219 US 307. In that case, an Alabama statute regulating insurance permitted a policyholder to recover, in addition to actual loss, 25% of the amount of such actual loss, but only if the insurance company issuing the policy was a member of a rate-fixing organization. The additional 25% of actual loss could not be recovered from an insurance company which made its rates independently of a rating organization. The contention was made that this statute deprived insurance company members of rating organizations of their property without due process of law, and denied them equal protection of the laws, in violation of the 14th Amendment. This contention was rejected, and the statute upheld as a legitimate exercise of the State police power. This Court said (219 US at 316):

> "We can well understand that fire insurance companies, acting together, may have owners of property practically at their mer .y in the matter of rates, and may have it in their power to deprive the public

Richards 99 NY 620; *Matter of Blandford* v. *McClellan* 173 Misc. 15; *Matter of Becker* v. *Lunn* 200 App. Div. 178; *Matter of Stenstrom* v. *Harnett* 131 Misc. 75, *affd* 224 App. Div. 127, *affd* 249 NY 606; Education Law § 144.

> generally of the advantages flowing from competition between rival organizations engaged in the business of fire insurance. In order to meet the evils of such combinations or associations, the State is competent to adopt appropriate regulations that will tend to substitute competition in the place of combination or monopoly."

The *German Alliance* case has been cited with approval recently by this Court both in the *South-Eastern Underwriters* case (322 US at 556) and in *California State Auto Association Inter-Insurance Bureau* v. *Maloney* 341 US 105, 109. The underlying principles are completely dispositive of these appeals.

II.

Even without the New York statutory requirements that the rating organization place its material in the public domain, appellants may not lawfully use their alleged property rights as they now urge to impose restrictions upon appellees North America's right and ability to compete.

Appellees North America smoked out this purpose of appellants by explicitly offering (without conceding liability) to make reparation by money payment in respect of the materials used by appellees for their filings (fols. 899-1152, 1184, 1186). Appellants rejected this offer both on the record (fols. 1159-1161) and through their brief in the Appellate Division. They made it clear in so doing that what they seek is not redress for an alleged appropriation of property, but the imposition of a restraint upon appellees North America's freedom of action. In their brief in the Appellate Division appellants said (p. 105):

> "The North America Companies cannot obtain any of the rating services of NYFIRO [the rating organization] merely by bargaining with respect to the alleged value of the rating services so desired; to obtain such services, they must become members or

subscribers of NYFIRO with respect to the rati service desired and agree to comply with the co ditions of its constitution and by-laws. The oblig tion to subscribe to and obey the conditions of t constitution and by-laws referred to in the statu cannot be evaded by the mere payment of a sum money. It is beyond the power of either NYFIR or the North America companies to bargain awa by private agreement the obligations placed upo them by statute."

Such concerted refusal to sell to non-members of a association on the basis of alleged copyright, even whe such a right exists, has been held to be an illegal "hamperin of business rivals" under the Federal antitrust laws. *Asso ciated Press* v. *United States* 326 US 1, 15. Refusal t sell even copyrighted material except upon condition tha uniform prices be maintained, is a violation of the Sherma Act. *United States* v. *Paramount Pictures* 334 US 131 142-3.

CONCLUSION

This record fails to present any substantial Federal question, and the matters dispositive of the decisions below need no further argument. This Court should either dismiss these appeals or affirm the determination below.

June 30 1955

Respectfully submitted,

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APPENDIX I

Section 180(1) of New York Insurance Law

"The purpose of this article is to promote the public welfare by regulating insurance rates to the end that they shall not be excessive, inadequate, unfairly discriminatory or otherwise unreasonable and to authorize and regulate cooperative action among insurers in rate making and in other matters within the scope of this article. Nothing in this article is intended (1) to prohibit or discourage reasonable competition, or (2) to prohibit or encourage except to the extent necessary to accomplish the aforementioned purpose, uniformity in insurance rates, rating systems, rating plans or practices. This article shall be liberally interpreted to carry into effect the provisions of this section."

APPENDIX II

Section 184(3) of New York Insurance Law

"Nothing herein contained shall be construed as requiring any insurer to become a member of or subscriber to any rating organization. Except to the extent necessary to meet the provisions of paragraphs (b) and (c) of subsection one of section one hundred eighty-three, uniformity among insurers in any matters within the scope of sections one hundred eighty-three and one hundred eighty-four is neither required nor prohibited."

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JUL 1 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

NO. 121, OCTOBER TERM, 1955

CHARLES P. CULLEN, as Treasurer of New York Fire Insurance Rating Organization, *et al.*,

Appellants,

vs.

ALFRED J. BOHLINGER, as Superintendent of Insurance of the State of New York, INSURANCE COMPANY OF NORTH AMERICA and PHILADELPHIA FIRE AND MARINE INSURANCE COMPANY,

Appellees.

On Appeal from the Court of Appeals of the State of New York and the Appellate Division of the Supreme Court, First Department, of the State of New York

MOTION TO DISMISS OR AFFIRM

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Supreme Court of the United States

No. 121, October Term, 1955

Charles P. Cullen, as Treasurer of New York Fire Insurance Rating Organization, *et al.*,

Appellants,

vs.

Alfred J. Bohlinger, as Superintendent of Insurance of the State of New York, Insurance Company of North America and Philadelphia Fire and Marine Insurance Company,

Appellees.

On Appeal from the Court of Appeals of the State of New York and the Appellate Division of the Supreme Court, First Department, of the State of New York

---

MOTION TO DISMISS OR AFFIRM

The appellee Superintendent of Insurance of the State of New York (herein called "appellee Superintendent"), pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeals taken herein from final orders of the Court of Appeals of the State of New York and of the Appellate Division of the Supreme Court, First Department, be dismissed or, in the alternative, that the final orders of the courts below be affirmed.

Opinions Below

No opinions were written by the New York Courts in this proceeding to review a determination of the Superintendent.* A memorandum decision of the New York Court of Appeals, which upon the Court's own motion dismissed the appeal taken to that Court as a matter of right by reason of the lack of any substantial constitutional question, is reported in 308 N. Y. 886. (See Appendix E of Jurisdictional Statement). The Court of Appeals had previously denied the appellants' motion for leave to appeal. The New York Appellate Division had unanimously confirmed, without opinion, the determination of the Superintendent in a decision reported at 284 App. Div. 963.

The determination of the Superintendent of Insurance is not reported. But it is set out at length in Appendix A of the Jurisdictional Statement.

Jurisdiction

Jurisdiction is invoked under 28 U. S. C., 1257 (2). But it has not been shown that the New York Courts deemed it necessary to pass upon the constitutionality of any of the provisions of the New York Insurance Law. The Appellate Division wrote no opinion in confirming the Superintendent's determination, which was attacked in appellants' petition on sixteen grounds, only two of which related to constitutionality. And the Court of Appeals, in dismissing appellants' appeal to it, did so expressly "upon the ground that on this record, no substantial constitutional question has been presented" (308 N. Y. 886; App. E, p. 63).

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* Leffert Holz was appointed to the office of Superintendent of Insurance in February, 1955, succeeding the originally named appellee, Bohlinger.

Question Presented

The question which appellants seek to present is whether Section 184 (4) of the New York Insurance Law, permitting appellees North America to file fire insurance rates on dwellings independently of the concerted ratemaking activity of the appellant rating organization, wholly or partly on the basis of material required to be filed publicly with the Insurance Department, violates the due process clause of the Fourteenth Amendment to the United States Constitution.

Statutes Involved

Section 184 (4) of the Insurance Law of the State of New York, as well as Sections 184 (1) and 181 (5), are set forth in Appendices F, G and H of the Jurisdictional Statement. Other pertinent sections of the Insurance Law, relied on by the Superintendent, are set forth in his decision. See especially Sections 180 (1) and 184 (3). (Jur. Statement, pp. 39 and 42; and Appendix to Motion of Appellees "North America" to dismiss or affirm).

Statement

This is an appeal from (1) an order entered on November 30, 1954 by the Appellate Division of the Supreme Court, First Department, of the State of New York, unanimously confirming without opinion a determination of the Superintendent of Insurance of New York; (2) an order entered on January 13, 1955 by the Court of Appeals of New York, denying appellants leave to appeal from the order of the Appellate Division, and (3) an order entered on April 12, 1955 by the Court of Appeals of New York, dismissing on its own motion, on the ground that "no substantial constitutional question has been presented"

appellants' appeal as of right on alleged constitutional grounds.

In brief, the Superintendent of Insurance held (1) that the appellees North America had the right under the New York Insurance Law to withdraw from the concerted rate-making activity of the appellant New York Fire Insurance Rating Organization for the dwelling classes of fire insurance and thus remain only partial subscribers to such rating organization, and (2) that appellees North America as partial subscribers had the right under the New York law to make an independent rate filing for the dwelling classes and (3) that the filing of those appellees could be supported on the basis of material required to be publicly filed with the Insurance Department by the rating organization.

Appellant New York Fire Insurance Rating Organization is an incorporated association organized and licensed under the State Insurance Law to make fire insurance rates for its members and subscribers in the State of New York (fols. 116, 129, 194, 207, 342).* The fifty appellant insurance companies are members of the rating organization engaged in the business of fire insurance in New York (fols. 195, 1085-1097). There are 128 other stock fire insurance companies which are members of the rating organization, and 81 insurance companies which are subscribers to its services (fols. 131, 342).

Members and subscribers of the rating organization write about 90% of the fire and allied line insurance premium volume in New York (fol. 209).

In carrying out its basic price-fixing function, the rating organization compiles certain information as to fire protection facilities and hazards which is useful in the making of fire insurance rates. This material is described in the

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* Folio references are to the printed record in the Appellate Division.

decision of the Superintendent (App. A of Jurisdictional Statement, pp. 28-29, 31).

Appellees North America are Pennsylvania corporations licensed to do business in New York (fols. 128-129). The parent, Insurance Company of North America, was organized in 1792 and incorporated in 1794 as a capital stock fire and marine insurance company.

On December 7, 1953 appellees North America notified the rating organization by letter that they thereby terminated their subscribership to rating services for the dwelling classes of fire insurance, effective March 1, 1954 (fols. 1549-1551). Such rating services included rates for fire, extended coverage, additional extended coverage, wind storm and hail, vandalism and malicious mischief and time element coverages.

On the same day (December 7, 1953) appellees North America terminated their prior authorization to the Superintendent of Insurance to accept filings from the rating organization in their behalf for the dwelling classes (fols. 200, 1549-1551), and simultaneously filed with the Department of Insurance rates and schedules for the dwelling classes substantially identical with those filed by the rating organization in behalf of its members and subscribers, with the request that such independent filing be approved for use on and after March 1, 1954 (Exs. 19-29). The Superintendent took no action and this independent filing was deemed approved by operation of law under Section 184 (4) of the Insurance Law which provides that a filing not disapproved during a waiting period of fifteen days or any extension thereof shall be deemed approved (fol. 201).

Upon the request of the rating organization, the Insurance Department held hearings on February 25 and 26 and March 5, 1954 and the parties were given full opportunity to elicit evidence. After receipt of briefs and long consideration, a Deputy Superintendent rendered an opinion,

which was adopted and approved by the Superintendent on September 14, 1954.

On September 30, 1954, appellees North America filed independently with the Insurance Department new rates and schedules for the dwelling classes. These new rates were on the average approximately 10% below the rates for the same classes filed by the rating organization, and the new policies contained appropriate coverage and simplified forms. In accordance with the Insurance Law, the Superintendent approved these independent filings on October 4, 1954, to be effective October 20, 1954.

Appellants applied for and on October 21, 1954 obtained a temporary stay from Justice Breitel of the Appellate Division of the Supreme Court, First Department, preventing appellee North America from continuing use of its independent fire insurance rates which became effective on October 20, 1954, and requiring appellee North America to raise its rates for dwelling insurance to be identical with those made by the rating organization. This stay was lifted on November 30, 1954 by the entry of the Appellate Division's order unanimously confirming the decision of the Superintendent of Insurance. Appellants' further application for a stay was denied by Chief Judge Conway of the Court of Appeals on December 20, 1954. A still further stay application made by the appellants was denied by the full Court of Appeals on January 13, 1954. Finally, on April 7, 1955, Chief Judge Conway again refused a stay of appellees North America's independent rates requested by appellants in connection with the appeal on alleged constitutional grounds in the Court of Appeals.

It should be noted, however, that in the instant matter, only the Superintendent's determination of September 14, 1954 was before the courts for review.

ARGUMENT

No substantial federal question is presented by these connected appeals.

New York, following this Court's decision in *United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533, and the enactment of Public Law 15 of 1945 (79th Congress) amended Article VIII of its Insurance Law to encourage and facilitate reasonable competition in the fire and casualty insurance businesses. New York's policy is expressed in Section 180 (1) of the Insurance Law, which states that nothing in Article VIII of the law is intended "to prohibit or discourage reasonable competition." New York also amended its Anti-Monopoly Act (Gen. Bus. Law, § 340), specifically to cover the business of insurance to the extent it was not regulated by Article VIII of the Insurance Law.

Moreover, as a matter of police power and to aid the Superintendent in the exercise of his supervisory powers, it was provided that rating organizations and insurers should *publicly* file the data upon which their filed rates were based. Insurance Law, Section 184 (1); 184 (4); *Nebbia* v. *New York,* 291 U. S. 502; *German Alliance Insurance Company* v. *Hale,* 219 U. S. 307. All insurers who wished to compete for business and to file rates and any data deemed proper by them or necessary by the Superintendent take the risk, by filing, that when their rates become effective their filed data will become publicly known and will thereafter be available as a factor to be considered in connection with other proposed filings.

The appellants' grievance against the appellees North America, by reason of North America's withdrawal from their rating organization and the appellees' subsequent use of the organization's data, may provide the basis for some private right of action for breach of contract

or unfair competition, as the Superintendent observed (App. A, p. 40). But whatever damages or injunctive relief might be predicated upon appellants' private contract or "property" rights against the insurance company, appellees, there seems to be no basis for considering on this appeal any claim that either the Superintendent's action or that New York's legislation designed to prevent illegal restraints upon competition is unconstitutional. Except for the statute, the rating organization's concerted activities would have been illegal and could have been totally prohibited. Public Law 15 of 1945; *United States v. South-Eastern Underwriters Association* (*supra*).

Conclusion

Since no substantial federal question is presented, this Court should dismiss the appeals or affirm the determinations below.

Dated, New York, June 29, 1955.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 121

CHARLES P. CULLEN, as Treasurer of New York Fire Insurance Rating Organization, AGRICULTURAL INSURANCE COMPANY, *et al.*,

Appellants,

vs.

ALFRED J. BOHLINGER, as Superintendent of Insurance of the State of New York, INSURANCE COMPANY OF NORTH AMERICA and PHILADELPHIA FIRE AND MARINE INSURANCE COMPANY,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE APPELLATE DIVISION OF THE SUPREME COURT, FIRST DEPARTMENT, OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM

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Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE APPELLATE DIVISION OF THE SUPREME COURT, FIRST DEPARTMENT, OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM

Appellants submit this brief in opposition to the Motions to Dismiss or Affirm being made separately by the appellees, Insurance Company of North America and Philadelphia Fire and Marine Insurance Company, and by appellee Superintendent of Insurance of the State of New York, both pursuant to Rule 16 of this Court, and both received by

the attorney for appellants on June 30, 1955. The motion by the appellee companies is being made on the ground that the appeals herein from final orders of the Court of Appeals of the State of New York and of the Appellate Division of the Supreme Court, First Department, of the State of New York, do not present a substantial federal question, that the orders appealed from rest on an adequate non-federal basis, and that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. The motion by the appellee Superintendent of Insurance is made on the ground that the appeals do not present a substantial federal question.

JURISDICTION

The Court is respectfully referred to the section of appellants' Jurisdictional Statement entitled "Grounds on which Jurisdiction Is Involved", for a clear statement of the jurisdictional basis of this appeal. As the Appellants have already pointed out, they raised the constitutional issue in their petition for review of the appellee Superintendent's determination, as soon as the issues came into being, which was via that determination. (See *International Steel & Iron Company* v. *National Surety Company*, 297 U. S. 657 (1936)).

As a result of the determination by the appellee Superintendent, as approved by the New York courts, furthermore, it is impossible to avoid this constitutional question. No one denies that the appellants have a valuable property right in their rating system. There is a clear holding by the courts below, furthermore, that the statute permits the appropriation of the property in question. For so holding, the Superintendent apologetically remarked in his

determination: "It is not easy for anyone who respects property rights to conclude that they can be rightfully appropriated without the consent of the owner, especially a competitor." (See "Appendix A" of Jurisdictional Statement, at page 50). Counsel for the appellee companies, moreover, admit that this holding was the basis of the Superintendent's decision. At page 9 of appellee companies' Motion to Dismiss or Affirm, they say the following:

> "He made it plain that authorizing independent rate filings, based in whole or in part on material of the rating organization and others, was part of the plan for facilitating price competition."

The New York Court of Appeals, in dismissing appellant's appeal, as of right, moreover, taken in pursuance of the constitutional issues only, on the ground that the record presents no substantial constitutional question, adjudicated the merits of the constitutional issue now before this Court. (See cases cited at pp. 12 and 13 of the Jurisdictional Statement.)

QUESTION PRESENTED

As pointed out in the Jurisdictional Statement the appeals included herein comprise one case with one question and will be treated as such. The question presented is set out at pages 5-6 of the Jurisdictional Statement.

STATUTES INVOLVED

Sections 181(5), 184(1) and 184(4) of the New York Insurance Law are set forth in Appendices H, G and F, respectively, of the Jurisdictional Statement. Sections

180(1) and 184(3) of the Insurance Law are set forth in Appendices I and II attached to appellee companies' Motion to Dismiss or Affirm. These Sections are part of Article 8 of the Insurance Law, entitled "Rates and Rating Organizations". The sections which the appellee companies are attempting to make part of this appeal, although not necessary to the appellee Superintendent's determination, do not change in any respect the issues before this Court. None of the sections above referred to provides the necessary machinery or other guarantees for compensation to the appellants.

STATEMENT

We respectfully refer the Court to the section entitled "Statement of the Case", at pages 6-10 of the Jurisdictional Statement.

The following salient facts should be noted: the complexity, vastness and costliness of the appellant New York Fire Insurance Rating Organization's (hereinafter called NYFIRO) rating system; little of the material produced by NYFIRO is filed with the New York Insurance Department; the admission by the appellee companies that their filing was obtained by them as subscribers "from material furnished to us by the rating organization" and that as of December 7, 1953, the appellee companies' filing was identical with that which NYFIRO had made (pp. 234 and 228 of the printed "Record On Proceeding" before the Appellate Division); and that the appellee companies must continue to use NYFIRO's system in order to maintain the validity of their own filing.

It should also be noted that concerted rate making has always been a vital element of the Fire Insurance Industry

in New York State and that no intention to prohibit it was behind the 1948 Amendments to the New York Insurance Law. (*Matter of Importers & Exporters Insurance Company* v. *Rhoades,* 239 N. Y. 420 (1925); and Section 180 (1), New York Insurance Law, "Appendix I" of appellee companies' Motion.) As a matter of fact, the preamble section to the rating article of the New York Insurance Law declares that one purpose of the article is "to authorize and regulate cooperative action among insurers in rate making." (Section 180(1), New York Insurance Law, "Appendix I" of appellee companies' Motion.)

ARGUMENT

Any discussion of the issues herein must begin with the fact that NYFIRO is a duly authorized and legal entity, entitled to all the rights and privileges our Constitution and laws afford to all forms of business organization and human activity. The allusions in the arguments of appellees to *United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533 (1944); to Public Law 15 (15 U. S. C. Sections 1011-1015); to federal anti-trust laws, and cases decided thereunder (see cases at pages 8, 9, and 12 of appellee companies' Motion); and to the New York Anti-Monopoly Act (General Business Law, Section 340), are completely extraneous to the case at hand.

Federal anti-trust legislation is not applicable here. (See 15 U. S. C., Section 1012 [b].) There is no question here, furthermore, of the legality or propriety of NYFIRO's activities, as a rate-promulgating organization, under the New York Insurance Law or otherwise. Section 180(1) of the Insurance Law explicitly states, in fact, that one

of the purposes of the rating article is to authorize cooperative action among insurance companies. NYFIRO is exercising a lawful function, pursuant to the requirements of the Insurance Law, and under the supervision of the Superintendent of Insurance of the State of New York. The appellee companies have the right to become subscribers, without any restrictions, on the same basis as all other subscribers to NYFIRO's services (see Article V, Pl. Ex. 6, R. 175, 491).* By appropriating the property of NYFIRO, over its objection, and under circumstances amounting to confiscation, the New York Insurance Law and the appellee companies have deprived, and are depriving, NYFIRO of property, without due process of law, in violation of the Federal Constitution.

I.

Because a state gives a corporation the very right of existence, it cannot legally confiscate its property and give it to competitors. NYFIRO stands in the same legal shoes as a state-created corporation. The issue then, is one embracing the destruction of a basic property right of an established legal entity, under the guise of "state regulation."

In formulating a plan to allow independent insurers to operate in New York, the New York State Legislature, and appellee Superintendent of Insurance made one constitutionally vulnerable error which is now before this Court for rectification. Appellants are not before this Court to

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* Record page references are to the printed "Record on Proceeding" in the Appellate Division, First Department, which has been certified and filed in the Office of the Clerk of this Court.

contest principles of rate uniformity or partial subscribership. Appellants are here to point out, simply, but emphatically, that in permitting the appellee companies to expropriate highly valuable rating materials and to attach themselves parasitically to NYFIRO's intricate rating mechanism, without provision in the law for guaranteeing payment to appellants, Section 184(4) of the New York Insurance Law deprives appellants of their property, without due process of law, under the 14th Amendment to the Constitution of the United States.

The way the statute in question now stands, any company may use all NYFIRO services and materials, without payment and with impunity. This fact carries national significance, most states having adopted statutes embodying provisions similar to the provisions involved in these appeals. What the appellee insurance companies have done in New York was attempted in Canada by other companies, but the Supreme Court of Canada defeated the attempt at such an appropriation by competing companies (*Underwriters Survey Bureau, Ltd.* v. *Massie & Renwick, Limited* [1940] 1 D. L. R. 625, S. C. R. 218, affirming [1938] 2 D. L. R. 31, Ex. C. R. 103; and *Underwriters Survey Bureau, Ltd.* v. *American Home Fire Assurance Co.* [1939] 4 D. L. R. 89).

Other companies have jumped on the bandwagon for a free ride, at the expense of their competitors. The rating system, which is the subject of these appeals, is valued at over $20,000,000.00 (R. 221, and Jurisdictional Statement "Appendix A", p. 31), and costs over $2,100,000.00 a year to operate and maintain (R. 182, and Jurisdictional Statement, "Appendix A", page 31). Without constant

revision, the system and materials would lose their validity as a rating mechanism. Broaden the horizon to encompass almost all of the nation, and the problem makes for a major upheaval in the insurance industry—without orderly procedure and without constitutional protection.

It is true that the appellee companies offered to pay for NYFIRO services (at the Administrative Hearing—before the constitutional issue came into the picture) but there is no guarantee written into the law, that such payments always would be forthcoming or adequate.* Without such provisions, the law is unconstitutional.

II.

The footnote reference of appellees to local law relating to materials open to public inspection (see pp. 9-10 of appellee companies' Motion) overlooks a number of important factors not covered by the cases cited therein. There was never a claim in any of those cases that anyone no less a competitor had any property right in the documents on file—nor was there any claim that a constitutional right was violated.

It is significant moreover that relatively little of the material produced by the Rating Organization is filed with the Insurance Department. Only that which is necessary to comply with the requirements of the Insurance Law is

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* What appellants argued in their brief before the Appellate Division in regard to payment (see page 11, appellee companies' Motion), was intended to persuade that Court, that the interpretation given the rating statute, generally, by the Superintendent of Insurance, was erroneous; that statement was devoted to other issues, furthermore, and has no bearing on the issue, as it stands before this Court.

submitted, while the great amount of statistical data which forms the basis of the filings and the basis of the manuals loaned to the members and subscribers is never even deposited with the Insurance Department (R. 207, 209-17). These include such materials as detailed surveys of cities and towns (R. 207); reports of inspection of buildings, water systems and fire fighting facilities, etc. (R. 374); numerous individual property surveys, such as inspections made of specifically rated properties in congested areas, inspections made of fire resistive dwellings, inspections made to determine whether property has been converted from a business use to a dwelling use, and maps which indicate the risks within given areas (R. 212-17). Many forms and much other data including rate cards are delivered to the members and subscribers, but not submitted to the Insurance Department (R. 220-1, 410).

It is to be observed, furthermore, that by the provisions of Section 181, subdivision (5) of the New York Insurance Law, only a person "upon whose property or risk a rate applicable thereto has been made" has a right to demand "pertinent information as to such rate and a copy of the schedule, if any, as applied to such property or risk." Moreover, he is required to pay a fee for such information.

All of these factors make it clear that this question could not have been decided on the basis of the cases cited. This case could not have been decided on the basis of local law once it was agreed upon that appellants have a property right in their rating system. This has never been denied (See cases cited in Jurisdictional Statement, pp. 14-17). Rather it has been the contention of appellees all along, and it was the holding of the appellee Superintendent, that it is in face of the property right held by

appellants in their rating system, that the state can legislate permission to competitors to expropriate the system for their own purposes, in competition with appellants (See briefs in Appellate Division of appellee companies, at pp. 26-9, and of appellee Superintendent, at pp. 21-7; and briefs in Court of Appeals in Opposition to Motion for Leave to Appeal, of appellee companies, at pp. 5-7, and of appellee Superintendent, at pp 2-3).

Appellee companies also make the following statement in their Motion, at page 9:

> "It [NYFIRO] should not be heard to complain, therefore, that the statute giving it life and breath conditions its continued existence on, among other things, placing in the public realm its rate filings with supporting information, and authorizing an insurer to file independent rates supported by the *filings* of the rating organization for the same classes of insurance." (Emphasis added)

What the appellee companies expropriated was not limited to the filings of NYFIRO. It was, and is, the entire work product of NYFIRO, consisting of matter filed and matter not filed, and daily changes in the rating operations, which are not reflected in the appellee companies' filings. Uncontested testimony on this subject, was given by H. Sumner Stanley, General Manager of NYFIRO (R. 408-10).

There were changes in NYFIRO's system between March 1st and 5th, 1954; nine changes in classifications of towns; four changes in boundaries of fire protection districts; twenty-six publications of dwelling rates; two average blanket rates (R. 408). None of these changes is reflected in the appellee companies' filings (R. 408).

On the other hand, the appellee companies' letter to agents, of March 1, 1954, points out in underscoring, that *"North America's [appellee companies'] direct filings are identical with those presently effective"* (Def. Ex. D; R. 416, 640). This not only is incorrect, but also, is the appellee companies' means of directing their agents to use NYFIRO's rate cards (R. 414). By this means, the appellee companies attempt to make use of the daily changes serviced by NYFIRO (R. 415). NYFIRO has not granted permission to the appellee companies to use its town classifications for the classes of risks involved in this case (R. 429); or its exposure schedule on these classes (R. 430); or any of its data or material in connection with these classes.

While the appellee companies have made a so-called independent filing, they have made no independent promulgation of rates, pursuant thereto (R. 414-15). They have not, and cannot, moreover, pick up for filing, the constant daily changes in the NYFIRO system. As indicated, their agents, pursuant to their instructions, are not using rates in accordance with their filing, but are using rates of NYFIRO, which reflect the daily changes in the rating plan, not shown in the appellee filings (R. 409-10). The appellee companies have, in effect, directed their agents to use the rates, rules and forms of NYFIRO. By this method, the appellee companies expropriated the work product of NYFIRO, as that work product changed from day to day, and still are expropriating it, without the consent of, and without being required by law to make payment to NYFIRO.

III.

Appellees rely heavily on the case of *German Alliance Insurance Company* v. *Hale*, 219 U. S. 307 (1911) to support their argument, that the question at bar lacks substance. Clearly, this 1911 case, which began even earlier, arose under recognizably different circumstances. The purpose of the legislation in that case was to destroy all vestiges of combination; to prevent all concerted rate-making; and to do so, without any regulatory institutions. For those purposes, in those times, under those circumstances, the statute employed reasonable means to effect the object of legislation.

Between 1885 and 1912, twenty-three states enacted laws, forbidding insurance combinations, which significantly manifested the climate of opinion during that period. (Reprint of Government's Brief, in *United States* v. *South-Eastern Underwriters Association, supra,* at pp. 80 and 82.) Not until a later time, were some of those anti-trust laws superseded by legislation, which authorized collective activities by fire insurance companies. (See Government Brief, *supra,* at pp. 82-3.)

"There were no rating laws in New York State prior to 1911. Rates were unregulated. Rating organizations likewise were not regulated. However, their existence was not prohibited as was the case in some states, where anti-compact laws were in force." (New York State Legislative Document 1948 No. 46, *Report of the Joint Legislative Committee on Insurance Rates and Regulation,* at p. 37.)

The 1911 New York State Legislative Committee, known as the Merritt Committee, after thoroughly investigating and discussing the problem, recommended as follows:

> "As to the so-called anti-compact law: for the many reasons given, your Committee believes that it would be most unfortunate for the public if a condition of open competition in rates were forced by the State. The safe policy to follow in treating this subject is to recognize the good which flows from combination well regulated; to permit the companies to use rating associations and bureaus to develop the principle of schedule rating and to spread the cost of determining proper rates among the companies, and to permit them to agree to maintain those rates." (New York State Assembly Document 1911 No. 30, *Report of the Merritt Committee,* 1943 Reprint, at pages 124-5.)

Thus it is seen that New York State does not want to prevent cooperative action; rather, its purpose is to authorize and regulate it. (Section 180 (1), New York Insurance Law, appellee companies' Motion, "Appendix I".) But in so doing, it has gone beyond the established principles of reasonable regulation, resulting in the confiscation of property, without compensation, in violation of the 14th Amendment. (See cases cited at pp. 17 and 18 of the Jurisdictional Statement; see, also, *Frost* v. *Railroad Commission of State of California,* 271 U. S. 583 (1926); *Smith* v. *Cahoon,* 283 U. S. 553 (1931); and cases cited therein, drawing the distinction between complete prohibition of an activity, and permitting it, but imposing unconstitutional conditions upon its existence.)

The case of *California State Auto Association Inter-Insurance Bureau* v. *Maloney,* 341 U. S. 105 (1951), is just as meaningless for the case at bar, in the light of the following statement of the Court, at page 108:

> "We were advised on the argument that the premiums chargeable can be commensurate with the greater risks of the new business. Confiscation is therefore not a factor in the case."

Under the Section of the New York Insurance Law here in issue, appellants have no right to charge anything for the use of their property, nor in any other way to protect it from the grasping hands of competitors. Appellants must pay for the rating system, but competitors like the appellee companies, need not. Confiscation, therefore, is a factor in *this* case.

Perhaps it is true, as Justice Holmes observed in *Louisville & Nashville Railroad* v. *Central Stockyards Company*, 212 U. S. 132 (1909) that a valid law could have been enacted for the same purpose, but that could not save the law which was enacted without guarantees of compensation. Here, the same goal—permitting independent insurers to use NYFIRO's property and services—could have been accomplished in a constitutional manner, merely by inserting the proper guarantees of payment in the controlling law. But the fact is this was not done. And no amount of legalistic rhetoric can correct that fatal error.

CONCLUSION

Both motions to dismiss or affirm, one by the appellee companies and the other by the appellee Superintendent of Insurance, should be denied.

July 15, 1955.

Respectfully submitted,

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Appellate Division of the Supreme Court of New York, First Department. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Samuel A. Berger* for appellants. *Jacob K. Javits,* Attorney General, *James O. Moore, Jr.,* Solicitor General, and *Samuel A. Hirshowitz* and *Daniel M. Cohen,* Assistant Attorneys General, for the Superintendent of Insurance of New York, and *Ralph M. Carson* and *W. Perry Epes* for the Insurance Company of North America et al., appellees. Reported below: 308 N. Y. 886, 126 N. E. 2d 564; 284 App. Div. 963, 136 N. Y. S. 2d 361.

No. 121. CULLEN ET AL. *v.* BOHLINGER, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, ET AL. Appeal from the Court of Appeals of New York and the